IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1052

L. T. WALLACE as Director of Food and Agriculture of the State of California and M. H. BECKER as Director of the County of Los Angeles, California, Department of Weights and Measures,

Petitioners,

vs.

THE RATH PACKING COMPANY, a corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioners L. T. Wallace as Director of Food and Agriculture of the State of California,[1] and M. H. Becker as Director of the County of Los Angeles, California, Department of Weights and Measures, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 29, 1975.

The States, organizations, and law enforcement officers listed in footnote 2 have authorized petitioners

[1]Dr. Wallace was appointed to succeed C. B. Christensen as Director during the pendency of this matter in the Court of Appeals.

to advise the Court that they support the granting of certiorari.[2]

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[2]The following jurisdictions and organizations support the granting of certiorari in this case.

States:

Bruce E. Babbitt, Attorney General of **Arizona;** Carl R. Ajello, Attorney General of **Connecticut;** the State of **Hawaii,** John Farias, Jr., as Chairman of the Board of Agriculture, George Mattimoe, Deputy Director; the State of **Louisiana,** Department of Justice, William J. Guste, Jr., Attorney General; the Commonwealth of **Massachusetts,** Francis X. Bellotti, Attorney General; Robert Woodahl, Attorney General of **Montana;** Paul L. Douglas, Attorney General of **Nebraska;** Robert List, Attorney General of **Nevada;** Louis J. Lefkowitz, Attorney General of **New York;** the State of **Oregon;** the Commonwealth of **Pennsylvania,** Department of Agriculture, Raymond J. Kerstettler, Acting Secretary; William J. Janklow, Attorney General of **South Dakota; Washington** State Department of Agriculture, by Slade Gordon, Attorney General.

Organizations:

Associated Dairymen; Associated Milk Producers, Inc.; California Cattlemen's Association; California Citizen Action Group; California Farm Bureau Federation; Consolidated Milk Producers for San Francisco; Consolidated Milk Producers of Tulare County; Consumers Cooperative of Berkeley, Inc.; Federated Dairymen; Mid-America Dairymen, Inc.; League of California Milk Producers; Milk Producers Council; National Association of Retail Grocers of the U.S. Inc.; National Consumers Congress; Producers' Market Milk Association; Scale Manufacturers Association, Inc.; Western Dairymen's Association.

Other California Law Enforcement Officers:

D. Lowell Jensen, District Attorney, Alameda County; Thomas L. Kelly, District Attorney, Alpine County; Guy E. Reynolds, District Attorney, Amador County; Kenneth H. Leach, District Attorney, Butte County; Joseph W. Kiley, District Attorney, Calaveras County; Robert W. Weir, District Attorney, Del Norte; Terrence M. Finney, District Attorney, El Dorado County; Noble Sprunger, County Counsel, El Dorado County; William A. Smith, District Attorney, Fresno County; L. H. Gibbons, District Attorney, Inyo County; Ralph B. Jordan, County Counsel, Kern County; Albert M. Leddy, District Attorney, Kern County; Harold L. Abbott, District Attorney, Lassen County; John K. Van de Kamp, District Attorney, Los Angeles County; Bruce Bales, District Attorney, Marin County; Douglas J. Maloney, County Counsel, Marin County; Duncan M. James, District Attorney, Mendocino County; Russell M. Koch, County Counsel, Merced County; John P. Baker, District Attorney, Modoc County; James D. Boitano, District Attorney, Napa County; Ronald L. MacMiller, District Attorney, Nevada County; Cecil Hicks, District Attorney, Orange County; Gerald E. Flanagan, District Attorney, Plumas County; Byron C. Morton, District Attorney, Riverside County; John M. Price, District Attorney, Sacramento County; Edwin L. Miller, Jr., District Attorney, San Diego County; Joseph Freitas, District Attorney, City and County of San Francisco; Joseph H. Baker, District Attorney, San Joaquin County; Robert N. Tait, District Attorney, San Luis Obispo County; Keith C. Sorensen, District Attorney, San Mateo County; James M. Cramer, District Attorney, San Bernardino County; Stanley M. Roden, District Attorney, Santa Barbara County; Louis P. Bergna, District Attorney, Santa Clara County; Christopher C. Cottle, District Attorney, Santa Cruz County; Shasta County, Robert A. Rehberg, County Counsel; Robert W. Baker, District Attorney, Shasta County; Gene L. Tunney, District Attorney, Sonoma County; Donald N. Stahl, District Attorney, Stanislaus County; Edward F. Buckner, County Counsel, Sutter County; H. Ted Hansen, District Attorney, Sutter County; Henry J. Goff, Jr., District Attorney, Tehama County; Calvin E. Baldwin, County Counsel, Tulare County; J. W. Powell, District Attorney, Tulare County; Stephen Dietrich Jr., County Counsel, Tuolumne County; C. Stanley Trom, District Attorney, Ventura County; Bartley C. Williams, District Attorney, Yuba County.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears at Appendix A, *infra,* pp. 1-47. The opinion of the District Court for the Central District of California is reported at 357 Fed. Supp. 529, and appears at Appendix A, *infra,* pp. 47-58.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 29, 1975. *See* Appendix A, *infra,* p. 1. This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1254(1).

Questions Presented

1. Whether the Court of Appeals erred in holding that California may not exercise its police power to assure the California public and competitors that packaged meat products bear accurate statements of weight, which holding is contrary to principles affirmed by the Second Circuit in *General Mills, Inc. v. Furness,* 508 F. 2d 836 (1975).

2. Whether the Court of Appeals erred in reversing the District Court's determination that a United States Department of Agriculture regulation which purports, without specifying any limits, to permit "reasonable variations" from label statements of weight on packaged meat products was void for vagueness.

3. Whether the Court of Appeals erred in holding that the District Court had jurisdiction to review Rath's defenses to prior-filed state court actions after the District Court had remanded the state court actions.

4. Whether the Court of Appeals erred in affirming issuance of an injunction requested by respondent when there was substantial evidence of Rath's violations of law and unclean hands.

Constitutional and Statutory Provisions Involved

The case involves Article VI, clause 2 of, and Amendment X to, the United States Constitution; the Wholesome Meat Act, 81 Stat. 584 *et seq.*, 21 U.S.C. section 601 *et seq.*; 9 Code of Federal Regulations section 317.2(h)(2); and California Business and Professions Code section 12211; California Stats. 1963, ch. 353; which are reprinted in pertinent part in Appendix B, *infra,* pp. 59-69, and Title 4, Calif. Admin. Code, ch. 8, subch. 2, Art. 5, section 2930 *et seq.*, which is set out as Appendix D, *infra,* pp. 97-113.

Statement Pursuant to Rule 33(2)(b)

Since this proceeding draws into question the constitutionality of the Act of March 4, 1907, as amended 81 Stat. 584, 21 U.S.C. sections 601 *et seq.*, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. section 2403 may be applicable.

No court of the United States as defined by 28 U.S.C. section 451 has, pursuant to 28 U.S.C. section 2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question.

Statement of the Case

In the trial court respondent claimed that jurisdiction was conferred by 28 U.S.C. section 1331(a) as it alleged that a case or controversy arising under the laws of the United States involving more than $10,000 was presented. For reasons set out *infra,* petitioners contest the assumption of jurisdiction by the trial court.

To assure California consumers, wholesalers and retailers that the packages they purchase contain the quantity stated on the label, and to protect markets for producers, petitioners and their predecessors, California weights and measures officials, have, pursuant to state law (Cal. Bus. & Prof. Code § 12211 and 4 Cal. Admin. Code § 2930 *et seq.* (Article 5)) and for more than 15 years, inspected products of all manufacturers and packers, applying the same accurate-weight-on-the-average standard regardless of the origin of the commodity inspected.

In the course of enforcing these truth-in-packaging laws during the period April 1971 through March 1972, petitioner Becker inspected lots of bacon packaged by respondent The Rath Packing Company (Rath) when offered for retail sale. These packages carry a representation by Rath of the weight of the contents (*e.g.*, Net Weight 16 oz. (1 lb.)). After determining that lots of Rath bacon bore false statements of weight, petitioner Becker ordered them off sale.[3] More than 100 lots of Rath bacon were ordered off sale. Conferences were had with Rath representatives at which they were advised that Rath must deliver to the purchasers the net weight represented on the package.

As a result of Rath's failure to meet this standard, on February 17, 1972, the Riverside County, California, District Attorney filed a civil action against Rath in Riverside County Superior Court, for violation of California false advertising and unfair competition statutes. On March 1, 1972, the Los Angeles County, California, District Attorney filed a similar action in Los Angeles County Superior Court.[4] Rath removed each of these cases to United States District Court and filed answers and counter-claims in that court.

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[3]Both the District Court and the Court of Appeals acknowledged the statistical validity of the California testing procedure (Article 5), Appendix A, *infra*, at 8 and 52. Utilizing Article 5 there is but one chance in one thousand that the determination that a lot is short weight is not correct.

[4]The texts of the statutes upon which these complaints are based (Cal. Bus. & Prof. Code § 17500 and Cal. Civ. Code § 3369) are set out in Appendix B, *infra*, pp. 69-71.

Each California Superior Court action alleged that statements of weight placed by Rath upon its packaged bacon were untrue as in fact packages were short weight when inspected at the retail level. In its answers filed in the removal proceedings, Rath asserted as a defense to the California Superior Court actions, federal preemption. By counterclaim, Rath sought declaratory and injunctive relief alleging preemption of California's weights and measures laws by the federal Wholesome Meat Act.

On March 20, 1972, the District Court entered orders remanding each action to its original California court, finding at least with respect to the Riverside action that there was no diversity of citizenship and "[n]o substantial federal question is presented on the face of the pleadings."

Meanwhile, on March 17, 1972, Rath filed the action in the District Court which petitioners now seek to have this court review.

In each new District Court action, Rath complained for declaratory and injunctive relief based upon allegations that certain state statutes were preempted by the Wholesome Meat Act. Rath's District Court complaints raised identical issues to those set out in its answers and counterclaim filed upon removal of the state court actions and to those made in its answers and cross-complaints in the state court complaints. *The state statutes which Rath challenged by its action in District Court are the very ones under which the Los*

Angeles and Riverside County District Attorneys had brought suit against Rath.

On November 27, 1972, the District Court denied Christensen and Becker's motion to dismiss the action below for want of jurisdiction. Petitioners then sought review of this decision in the Ninth Circuit. The Court of Appeals declined to disturb the District Court's assumption of jurisdiction.

On April 3, 1973, the trial court entered its Memorandum Opinion and Order (Appendix A, *infra,* pp. 48-57). That decision held, in part, that California Business and Professions Code section 12211 and Title 4, California Administrative Code, chapter 8, subdivision 2, Article 5, are preempted by federal law, and enjoined their enforcement. The District Court also held that 9 C.F.R. section 317.2(h)(2) was void for vagueness.

The Court of Appeals affirmed the preemption holding and reinstated the federal regulation.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals Deprives California of Its Sovereign Authority to Protect the Health and Welfare of Its Citizens, Conflicts With the Principles Enunciated in Prior Decisions of This Court, and Is Contrary to Principles Affirmed by the Second Circuit in General Mills, Inc. v. Furness

A. The Decision Below Deprives California of Its Sovereign Police Power

As this court said almost 80 years ago:

> "Where the subject is of wide importance to the community, the consequences of fraudulent practices generally injurious, and the suppression of such frauds matter of public concern, it is within the protective power of the State to intervene. Laws providing for the inspection and grading of flour, the inspection and regulation of weights and measures, the weighing of coal on public scales, and the like, are all competent exercises of that power. . . ." *Patapsco Guano Co. v. North Carolina,* 171 U.S. 345, 358 (1897).

And as more recently stated in *Florida Lime and Avocado Growers v. Paul,* 373 U.S. 132, 144 (1962):

> "[T]he supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern. . . . [T]he States have always possessed a legitimate interest in the protection of . . . [their] people against fraud and deception in the sale of food products at retail markets within their borders."

In the face of this Court's repeated affirmation of the right of the States to assure their citizens

of truth and wholesomeness in the marketplace, the Court below held that California laws, designed to prevent fraud in the marketplace by requiring that label weight statements be accurate when the product is purchased (Cal. Bus. & Prof. Code § 12211 and Article 5), offend Article VI, section 2, the supremacy clause, of our federal Constitution when viewed against 21 U.S.C. section 678. *See Armour v. Ball* (6th Cir. 1972) 468 F. 2d 76; *cert. den.* 411 U.S. 981.

However, no article or clause of our federal Constitution relinquishes the police power of the States. And the Tenth Amendment specifically reserves to the States all powers not delegated to the United States by the Constitution, nor prohibited by it to the States.

Thus, in order for the Court below to conclude that California laws were preempted by section 678 of the Wholesome Meat Act, it must necessarily have concluded that the States had, by Constitution, yielded the necessary authority to the federal government.

Yet, nowhere in our Constitution is this power expressly or impliedly relinquished, and in light of *Patapsco Guano, supra,* and *Florida Lime and Avocado Growers, supra,* petitioners urge that this Court has specifically affirmed the police power of the States in this field and that the Court below erred.

B. The Court Below Erred in Finding (1) an Intent by Congress to Preempt State Standards and (2) That California Had Exceeded the Scope of Its "Concurrent Jurisdiction" to Enforce the Wholesome Meat Act

Assuming, *arguendo,* that Congress may restrict the authority of the states in this field, petitioners contend

the circuit court erred in holding that the California standard of true weight on the average at retail is preempted by the federal standard.

Deciding whether a state statute is in conflict with a federal statute and invalid under the Supremacy Clause is a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question of whether they are in conflict. *Perez v. Campbell,* 402 U.S. 637, 644 (1970). Preemption is found only where there is a direct and positive conflict between the state and federal objectives—where the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941); *Perez v. Campbell, supra,* at 651-52.

The purpose of the Wholesome Meat Act is to protect consumers and competitors from misbranded and adulterated meat products. (21 U.S.C. § 602.) Under this Act a packaged meat product is misbranded unless it bears "an accurate statement of the quantity of contents . . . *Provided,* That . . . reasonable variations may be permitted . . . by regulations prescribed by the Secretary [of Agriculture]." (21 U.S.C. § 601(n)(5).) Pursuant to this authority the Secretary has adopted 9 C.F.R. 317.2(h)(2).[5]

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[5] 9 C.F.R. 317.2(h)(2) provides:
"The statement as it is shown on a label shall not be false or misleading and shall express an accurate statement of the quantity of contents of the container exclusive of wrappers and packing substances. Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large."

California Business and Professions Code section 12211,[6] which the lower federal courts held to be preempted by the Wholesome Meat Act, requires that each "sealer" (weights and measures official) weigh packages "in order to determine whether [they] contain the quantity or amount represented . . ." and permits the Director of Food and Agriculture to adopt regulations for the accomplishment of this objective provided that the average weight or measure of the packages . . . in a lot . . . sampled shall not be less . . . than the net weight or measure stated upon the package. . . ." The Director adopted such a uniform testing procedure (4 Cal. Admin. Code § 2930 *et seq.*) which both the District and Circuit Courts recognized to be statistically valid (Appendix A, *infra,* at p. 8 and p. 52), but criticized for not recognizing only the causes of variations described in 9 C.F.R. 317.2(h)(2).

Petitioners contend that the court below erred in its determination of the existence of a conflict between state and federal laws and in its assessment of the extent of that conflict. *First,* the purpose and effect of the invalidated California law are to require and enforce true weight on-the-average at retail. This standard is fully in accord with the intent of the Wholesome Meat Act. (As the courts below acknowledged Article 5, the California testing procedure, is a statistically sound means of determining the true weight of any lot of product.)

Second, use of the true-weight-on-the-average standard and of numerical limits on the reasonableness of variations are specifically authorized by the Secretary

[6]The full text of this statute is set out in Appendix B, *infra,* pp. 68-69.

of Commerce, National Bureau of Standards (United States Department of Commerce, National Bureau of Standards, Checking Prepackaged Commodities, 1959). *Third,* federal agencies have adopted the accuracy-on-the-average interpretation used by California but rejected by the court below. The United States Department of Agriculture and Environmental Protection Administration each has interpreted statutes which require that label statements of weight be accurate, but which allow adoption of regulations which permit reasonable variations to require accurate weight *on the average.* (Appendix B, *infra,* at pp. 71-73.)

Thus the court below erred (1) in finding the weight standard enforced in California to be in conflict with that established by the Wholesome Meat Act, and (2) in concluding that California's laws are preempted.[7]

Even assuming, *arguendo,* that there is a conflict between state and federal standards, there are no facts justifying the conclusion that the state system stands in opposition to the federal—a necessary precondition to a finding of preemption. Not only is there no direct and positive conflict between the objectives of the state and federal laws, but it is only through enforcement of the state laws that the purposes of the federal law is being carried out. V. L. Hutchings, officer in charge of the USDA Western Region Compliance Staff, testified at trial that (1) he has seven

[7]*Armour v. Ball, supra,* is inapposite as there the ingredient standard sought to be imposed by Michigan was, *arguendo,* materially different from the standard promulgated by the Secretary of Agriculture. By contrast, in the instant case the California standard is in accord with principles established by the National Bureau of Standards and similar to the former USDA (now EPA) regulation which was adopted pursuant to a statute which imposes a standard identical to that in issue.

compliance officers for the 12 western states (including Alaska and Hawaii), (2) these officers do not themselves have the training or equipment to make the necessary retail level inspections, and (3) USDA must therefore rely upon States and state procedures to determine whether product is short weight. And while there is not one reported case of USDA enforcement of truth of packaging standards under the Wholesome Meat Act, in 1975 alone Los Angeles County brought 363 court cases. It should be clear from this evidence that it is only by means of the enforcement action of California weights and measures officials that the Federal statutory standard of true weight at retail is enforced.

C. The Decision Below Is Contrary to Principles Affirmed by the Second Circuit in General Milis, Inc. v. Furness

In *General Mills, Inc., et al. v. Furness,* 398 Fed. Supp. 151 (S.D. N.Y. 1974), *affd.* 508 F. 2d 536, the court rejected plaintiff's contention of preemption of a New York City ordinance regulating the weight of prepackaged commodities which was found to be substantially more stringent than applicable federal standards (under the Food, Drug and Cosmetic Act, 52 Stat. 1040, 21 U.S.C. § 301 *et seq.* and Fair Packaging and Labeling Act, 80 Stat. 1296, 15 U.S.C. 1451 *et seq.*)

Taking particular note of the defendant's interest in regulating weights and measures, the court affirmed the City of New York's power to regulate in this field even though one consequence might be to require out of state packagers to alter their practices to conform to the local standards which are applied equally to all.

Petitioners contend that the principle of *General Mills v. Furness,* reaffirming the power of state and local agencies in non-discriminatory regulation of weights and measures, is applicable in the instant case and that the court below erred in voiding California's non-discriminatory enforcement procedure.

D. The Decision Below Will Have a Decisive, Adverse Impact Upon Consumers and Competitors and Upon Federal-State Relations

The decision below voids state laws designed to (1) enable consumers to rely upon the truth of representations made to them in the marketplace, (2) assure that all competitors must meet the same, beneficial standards. To all the States the consequences of the ruling below are severe. If the ruling below is permitted to stand, the States will be unable to prevent the sale of foodstuffs which are falsely labeled or adulterated.

The present state laws which require a uniform standard of accuracy are important to: (1) *consumers* who must rely on package labels showing net weight or net quantity in comparing values among competing products, (2) *retailers* who not only sell packaged goods in competition with other retailers, but who are also large purchasers of packaged products which they then repackage into smaller products, for example meat cuts and cheeses, (3) *restaurant operators, schools and other institutions* that buy large quantities of packaged foods, (4) *federal agencies* such as the Department of Defense and the Veteran's Administration that buy large quantities of packaged foods, (5) *packagers* of food and other consumer products who are in competition with domestic and foreign packagers, (6) *farmers*

who sell to packagers, since shortages in packages can mean less total product purchased, and (7) *manufacturers and servicers of packaging, weighing and measuring equipment* since packagers who are permitted shortages depending upon the type of equipment used are induced to use poor rather than modern, accurate equipment.

Petitioners contend that no constitutional principle permits the result reached by the circuit court. As Justice Charles Evans Hughes said in *Savage v. Jones,* 225 U.S. 501, 528 (1911):

> ". . . the Constitution of the United States does not secure to anyone the privilege of defrauding the public."

The conflict of the ruling below with the sovereign authority of the States to prevent fraud in the marketplace and with principles of prior decisions of this Court justify the granting of certiorari.

2. In Reversing the Trial Court's Finding That 9 C.F.R. Section 317.2(h)(2) Was Void for Vagueness, the Court of Appeals Has so Far Departed From the Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision Over Federal Courts

When read together with 9 C.F.R. section 317.2(h)(2), 21 U.S.C. section 601(n)(5) defines a packaged meat product to be misbranded if it is "unreasonably" short weight.

While the Court of Appeals recognized the public importance of the question of the validity of 9 C.F.R. section 317.2(h)(2), Appendix A, *infra,* at p. 26, it

treated the matter summarily and overturned the trial court's well reasoned conclusion that the regulation was void for vagueness.

In so holding the Court of Appeal categorized the question as one of "facial" invalidity (Appendix A, *infra,* at p. 26), stated there was no evidence tending to show how much weight variation is considered reasonable by the trade, and concluded that Christensen and Becker had the burden of showing that the regulation is incapable on its face of setting a standard for its enforcement but had failed to meet that burden (Appendix A, *infra,* at p. 35). The court below also ignored the evidence introduced in the trial court and that court's refusal to hear other evidence on these very issues.

Assuming, *arguendo,* that the Court of Appeals is correct in its assertion that the issue is one of facial invalidity of the questioned regulation, the court below clearly erred in its holding that the regulation as it interprets it sets an ascertainable standard.

The vagueness of the instant regulation as interpreted by the circuit court is manifest. As set forth *supra,* the court below interprets this regulation as permitting "reasonable variations." Yet nowhere in the regulation is there definition of the phrases (1) "good distribution practices," (2) "unavoidable deviations," (3) "good manufacturing practices," or (4) "reasonable variations." Moreover, as interpreted by the court below, the term "variations" suddenly takes on a *different* meaning—that of "shortages." Rather than follow (1) the accuracy-on-the-average interpretation utilized by the National Bureau of Standards, the federal agency charged by law (*See* 31 Stat. 1449, 15 U.S.C.

§§ 272(d) and (5)) with supervising weights and measures laws and enforcement, or (2) the same interpretation of an identical statutory standard by two federal agencies, or (3) the judgment of the trial judge who heard a USDA official describe how this regulation was being applied, the circuit court chose to ignore all constructions of the regulation which give an ascertainable standard and thus reverted to a non-standard.

The regulation as construed by the court below provides no guidance in determining whether a weight shortage is "reasonable" or "unreasonable," and is contrary to USDA administrative interpretation and EPA regulation under an analogous statute. *See supra,* at pp. 12-13 and Appendix C, *infra,* at pp. 71-73. And USDA practice in the meat inspection field is wholly arbitrary, the decision to recommend removal from sale of short weight packages depending solely upon "a judgment call" on the part of the Regional Compliance Officer. Testimony on this point by the Officer in Charge, Western Region, USDA Compliance Staff (*See* Appendix C, *infra,* at pp. 74-88) had considerable impact upon the trial judge, who found the regulation at issue to be void for vagueness.

And, when counsel for petitioner Becker attempted to introduce evidence of industry practice to show that other packers met the standard of regulation urged by petitioners—accurate weight on the average—the trial court refused to admit evidence on this point. (Appendix C, *infra,* at pp. 88-91.)

Thus, while holding that petitioners had the burden of showing the questioned regulation to be invalid, the Court of Appeals (1) ignored a construction of the regulation which would yield a useful standard, (2) ignored the trial judge's judgment in favor of petitioners after he heard only the evidence on this point which petitioners were permitted to introduce, and (3) failed to remand with instructions to the trial court to permit petitioners to introduce other evidence on this point to sustain the burden[8] which the circuit court finds that petitioners did not meet.

The result is fundamentally unfair—a clear denial of due process of law—requiring review by this court.

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[8]In validating the regulation the court below relied in large part upon this court's decison in *United States v. Shreveport Grain & E Co.,* 287 U.S. 77 (1932). However, as the District Court points out, 357 Fed. Supp. at 534, *Shreveport* does not reach the question presented in the instant case: the redelegation to each USDA compliance officer of deciding whether in "his judgment" a variation (caused by an unknown) is or is not "reasonable."

The court below also relied heavily upon validation by Congressional inaction: "Forty-two years of Congressional silence is strong evidence that Congress has acquiesced in the Secretary's [Agriculture] interpretation of the scope of his powers." (Appendix A.)

First, the logic in this statement is questionable—even long-standing acquiescence in unconstitutional activity cannot correct constitutional infirmities.

Second, Congressional inaction may, equally, stand for approval of the States' activity in this field.

Third, the absence of Congressional action on any question is hardly evidence of more than the inherent complexity and slowness of the legislative process. As the Congress has never had the occasion to review by legislative change the Secretary of Agriculture's enforcement of the Wholesome Meat Act, citation by the court below of *Red Lion Broadcasting Co. v. F.T.C.,* 395 U.S. 367, 381 (1969) and *Flood v. Kuhn,* 407 U.S. 253, 283 (1972) is inapposite.

3. The Holding of the Courts Below That There Is Federal Jurisdiction Raises Significant and Recurring Problems Concerning the Jurisdiction of Federal Courts and Is in Conflict With Prior Rulings of This Court

The complex procedural history of the action below and the two prior California Superior Court lawsuits is outlined in the statement of the case, *supra*.[9]

Petitioners contend that the court below grossly erred in holding that the facts of the instant case make inapposite application of the principle of this court's decision in *Missouri-Pacific Ry. Co. v. Fitzgerald*, 160 U.S. 556 (1896) and *Public Service Commission v. Wycoff*, 344 U.S. 237 (1952).

The consequence of this error by the court below was to confirm the fragmenting and scattering of litigation of the same questions among three courts, and to encourage future litigants who are sued by state law enforcement officers in state courts to bring "new" actions in federal court. The multiplicity of litigation and second class status for state courts which the

[9]The crucial facts are these: On February 17 and March 1, 1972, respectively, the District Attorneys (the Court of Appeals mistakenly ascribes these lawsuits to the County Counsel of these counties, Appendix A, *infra*, at pp. 9 and 10) of Riverside and Los Angeles Counties filed suit against Rath alleging violations of state false advertising and unfair competition laws because, when offered for retail sale, the weight representations made on the packages offered were false. Rath removed both cases to District Court. Three days prior to entry of the remand orders, Rath filed the action from which this petition arises. That action contains allegations virtually identical to those made in Rath's counter-claims filed during the removal proceedings and to those which Rath made in the state court actions, thus showing Rath's attempt to litigate its defenses to the State Court actions in Federal Court.

decision below encourages is in conflict with a proper relationship between state and federal courts. Just as a "new" action in federal court was brought in this case so could "new" actions be brought to halt all state enforcement activities.

In response to petitioners' contention that Rath's District Court action was nothing more than an attempt to get collateral review of the remand orders—a maneuver which is specifically prohibited by 28 U.S.C. section 1447[10]—the Court of Appeals reasoned that, notwithstanding the issuance of such an order by the District Court, Rath was entitled to a federal forum because the District Court had not made any decision with respect to the propriety of a federal forum for Rath's claims. Appendix A, *infra*.

In so holding the court below departed from this court's decision in *Missouri Pacific Ry. Co., supra*, that the policy of finality in remand orders is applicable in federal question as well as in diversity cases and that after remand federal question defenses *must* be litigated in the state court to which the action is returned. *Id.* at 583. *Accord Chandler v. O'Bryan*, 445 F. 2d 1045, 1057-58 (10th Cir. 1971).

Further, the Ninth Circuit's decision that the procedural history of this litigation does not demonstrate Rath's seizure of this litigation from state court is contrary to the principle enunciated by this court in *Public Service Commission v. Wycoff, supra*.

> "Where the complaint in an action for declaratory judgment seeks in essence to assert a defense

[10]28 U.S.C. section 1447 provides: "(d) An order remanding a case to the State court from which it is removed is not reviewable on appeal or otherwise. . . ."

to an impending or threatened state court action, *it is the character of the threatened action, and not of the defense,* which will determine whether there is federal question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. *This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigation from state courts merely because one, normally a defendant, goes to federal court to begin his federal law defense before the state court begins the case under state law.*" 344 U.S. at 248. (Emphasis added.) *See also Skelly Oil Co. v. Phillips Co.,* 339 U.S. 667, 672-74 (1950).

Attempting to distinguish the instant case from *Wycoff* the court below asserted that *Wycoff* applies only when the controversy is "merely threatened or impending" (Appendix A, *infra,* at p. 17) and that the instant controversy was not created by the institution of the state court actions against Rath, but arose independently thereof by virtue of the removal of short weight packages from sale prior to the commencement of the state court lawsuits. (Appendix A, *infra,* at p. 19.)

The facts compel a contrary conclusion. Even though petitioner Becker met with Rath representatives and

informed Rath that short weight packages would be removed from sale, which, according to the Court of Appeals, was sufficient basis for Rath to seek relief in a federal forum, Rath did *nothing* until the District Attorneys filed suit and even then Rath took no "independent" action until it realized that the state court actions would be remanded.

Further, reliance of the court below upon this court's decision in *Public Utilities Commission of California v. United States,* 355 U.S. 534 (1958) is misplaced. That case does not stand for the principle that *Wycoff* is merely a statement that controversies which are not ripe are not justiciable. Rather, it stands for an entirely different proposition: when an administrative agency cannot provide the remedy sought, the aggrieved party may seek relief in an appropriate tribunal.

By contrast, in the instant case, Rath's federal claims would be properly presented and appropriately considered in state courts. Rath was not without a state forum which would fairly consider its federal claims. And, in the manner in which those claims arose, Rath's claims were by way of defense to a charge of violating state laws. Thus *Wycoff* commands that those claims be litigated in the state forum, and thus the court below should have dismissed Rath's federal complaint for want of jurisdiction.

In *Hicks v. Miranda,* 423 U.S. 332 (1975), this court confirmed that the rule of *Younger v. Harris,* 401 U.S. 37 (1970) is designed to "permit state courts to try state cases free from interference from federal courts [citation omitted] particularly where the party to the federal case may fully litigate his claim before

the state court." 422 U.S. at 349. *Accord Samuels v. Mackell*, 401 U.S. 66 (1970).

While the state court prosecutions in the instant case were for injunction and civil penalties and thus not criminal in nature, they were nevertheless actions to enforce state statutes brought by law enforcement officials. Petitioners submit that for reasons analogous to those underlying this court's decision in *Younger v. Harris* the trial court below should not have undertaken to adjudicate this state court defendant's defenses when there was no indication that they would not receive fair treatment in state court.

Thus, the refusal of the court below to dismiss Rath's complaint was an egregious error requiring intercession by this court.

4. In Affirming the Trial Court's Issuance of an Injunction in the Face of Substantial Evidence of Rath's Unclean Hands, the Court Below Has Sanctioned a Departure From the Accepted Course of Judicial Proceedings and Disregard for Prior Decisions of This Court, as to Call for an Exercise of This Court's Power of Supervision

In *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806 (1945), this court confirmed that a party with unclean hands may not invoke the equity jurisdiction of a court, and noted the added significance of the doctrine of unclean hands where the suit in equity concerns the public interest. *Id.* at 815.

The instant case is one of public importance, as is demonstrated by the necessity for a weights and measures system upon which competitors and consumers

can both rely and by the impediments to commerce and to confidence in governmental agencies which result from failure of these agencies to discharge their duty of assuring the truthfulness of product information which is disseminated. The public significance and widespread effect of the ultimate decision in this case was recognized by the Court of Appeals. (Appendix A, *infra*, at p. 26.)

Although Rath knew its label statements of weight were false when its packaged bacon was sold to consumers, Rath fully intended and expected that consumers would believe those statements to be true. When confronted with this obvious duplicity Rath complained to the federal courts that the State of California would not permit Rath to continue this deceptive practice.

In the face of the recognized public importance of this case and apparent disregard of the facts—which showed Rath to be knowingly in violation of the statute which it sought to invoke,[11] thus clearly demonstrating Rath's unclean hands—the District Court granted, and the Court of Appeals affirmed, equitable relief to Rath.

Petitioners submit that this constituted a manifest abuse of discretion compelling review by this court.

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[11]Evidence introduced at trial showed that more than 45% of the packages of bacon which Rath produced were short weight at time of shipment from Rath's plant—in violation of 21 U.S.C. §607(b). Further, one of the components of the aqueous curing solution which Rath uses to cure its bacon, tripolyphosphate, causes the product to retain moisture. An offer of proof by Christensen of *Rath's own records* was made which revealed that during three weeks' production there was produced *3,904, 3,300 and 12,898 more pounds of bacon than pounds of raw product used*, a gross violation of federal laws. (Appendix C, *infra*, at pp. 95-96.)

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit

United States Court of Appeals, for the Ninth Circuit.

The Rath Packing Company, a corporation, *Plaintiff, Counter-Defendant and Appellant,* vs. M. H. Becker as Director of the County of Los Angeles Department of Weights and Measures, *Defendant, Appellee and Cross-Appellant.* Nos. 73-2481, 73-2482, 73-3092.

C. B. Christensen as Director of Agriculture of the State of California, *Intervenor, Appellee and Cross-Appellant.*

The Rath Packing Company, a corporation, *Plaintiff and Appellant,* vs. Joseph W. Jones as Director of the County of Riverside Department of Weights and Measures, *Defendant, Appellee and Cross-Appellant.* Nos. 73-2496, 73-3180.

[October 29, 1975]

Appeal from the United States District Court for the Central District of California.

Before: BROWNING and TRASK, Circuit Judges, AND RICH, Judge.*

RICH, Judge:

These suits were brought by Rath Packing Company (hereinafter "Rath") to enjoin the enforcement of certain California statutes and regulations pertaining to the labeling by weight of packaged foods at retail, and for a declaration that the federal Wholesome Meat

*The Honorable Giles S. Rich, Judge, United States Court of Customs and Patent Appeals, sitting by designation.

Act of 1967, 21 USC, §601 et seq., and a regulation promulgated thereunder, 9 CFR 317.2(h)(2), preempt these California statutes and regulations. They were consolidated for decision in the district court and on appeal.

Rath is a nation-wide processor and seller of meat products, including bacon, and maintains a meat-packing establishment at Vernon, California, which is subject to federal inspection under the Wholesome Meat Act and 9 CFR 302.1 as an establishment in which "any products of * * * carcasses of livestock are * * * prepared for transportation or sale as articles of commerce, which are intended for use as human food." Becker and Jones are the Directors of the Departments of Weights and Measures of Los Angeles and Riverside Counties, California, respectively. They are responsible for the actual enforcement of the State weights and measures laws in their counties. Intervenor Christensen is the Director of Agriculture of the State of California.

Jurisdiction in the district court was based on 28 USC, §1331(a), as it was alleged that a case or controversy arising under the laws of the United States involving more than $10,000 was presented.[1] We have jurisdiction of this appeal under 28 USC, §1291.

The district court, in a memorandum and order reported at 357 F. Supp. 529 (C.D. Cal. 1973), granted in part the relief requested, and all parties appealed the determinations adverse to them.

This case is a companion to *General Mills, Inc., et al. v. Jones,* Nos. 73-3583 and 74-1051, decided

[1]It is not disputed that the jurisdictional amount is present.

concurrently herewith. Much of the discussion in this opinion is applicable to the *General Mills* case as well.

Background

This case concerns the packaging and weighing of bacon. In order to understand the issues, a brief description of the properties of bacon and how it is packed and weighed is necessary.

The weighing and packaging of bacon at the Rath plant takes place under internal Rath procedures which have been submitted to an official of the United States Department of Agriculture (USDA). After the pickled and smoked pork bellies come from the bacon press, where they are squared into uniform rectangular shapes, they are sliced by a machine, which distributes the slices in "drafts" of approximately one pound weight. An operator places each draft on an insert, or "tux", board, which is a hardboard coated either with wax or with polyethylene.[2] The drafts are then passed to a scaling station, where they are weighed and the operator either adds or removes bacon to bring the weight within a predetermined target limit. After scaling the bacon is passed to a tux overwrap machine, which inserts the bacon into a carton and seals it. This carton is not hermetically sealed and the bacon in it does lose some moisture to the atmosphere over time. Although Rath now does use some hermetically sealed bacon containers, this packing method is agreed to be in accordance with good distribution practices.

[2]The polyethylene-coated boards have absorbed 4/16 oz. less of bacon moisture and grease than the wax-coated board 4 days after pack. The saturation point of waxed board is reached 6 to 9 days after pack; about 5/16 oz. is absorbed.

Once the bacon is weighed at the scaling station, it is not weighed again before it leaves the Rath plant, an average of 4 days, never more than 8 or 9 days, later. In determining the pass zone Rath follows the USDA procedure of subtracting from the actual weight of the draft and the tux board on which it lies the weight of a *dry* tux board. This method uses a "dry tare."[3] There is no evidence that Rath has violated federal weight standards in any way.

The federal program for regulation of net weight labeling of meat and meat food products exists in part under the Wholesome Meat Act of 1967, supra. The Act added the concept of "misbranding" to the prior federal meat inspection laws. 21 USC §601(n) provides in relevant part:

> (n) The term "misbranded" shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:
>
> * * * *
>
> (5) if in a package or other container unless it bears a label showing (A) the name and place of business of the manufacturer, packer, or distributor; and (B) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided,* That under clause (B) of this subparagraph (5), reasonable variations may be permitted, and exemptions as to small packages may be estabished, by regulations prescribed by the Secretary [of Agriculture];
>
> * * * *

[3]"Tare. * * * la: the weight of a container or vehicle that is deducted from the gross weight to obtain the net weight." *Webster's Third New International Dictionary* 2341 (1971).

In 9 CFR 317.2(h)(2) the Secretary purported to implement §601(n)(5):

> (2) The statement as it is shown on a label shall not be false or misleading and shall express an accurate statement of the quantity of contents of the container exclusive of wrappers and packing substances. Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large.

In the supermarket the California inspectors employed a different weighing method, using a "wet tare."[4] The California procedure is set forth in detail in 4 Cal. Admin. Code ch. 8, subch. 2, Art. 5. Briefly, the California inspectors follow a twelve-step procedure set forth in Section 2933.3 of the regulations:

> (1) determine the number of packages in the lot to be sampled;
>
> (2) from a table in the regulation, determine the total package sample size (e.g., 15 packages out of a lot of 300);
>
> (3) from the same table, determine the tare sample size (e.g., 2 packages out of a lot of 300);
>
> (4) record the gross weight of each tare sample package;

[4]The difference in tares employed is not an issue in this case.

(5) remove the usable contents from each tare sample, weigh the used, empty container, and compute the average tare weight;[5]

(6) weigh the remaining packages in the package sample and record their weights, determining the amount of error from labeled weight for each package;

(7) [not applicable to bacon];

(8) calculate the preliminary total error for the sample, and determine the arithmetical average error;

(9) calculate the range of error for each subgroup of the package sample;

(10) determine whether any unreasonable errors exist, and eliminate from further computations all samples whose errors exceed the preliminary average error in underweight situations by more than the amounts set forth in tables in the regulations; if the number of unreasonable errors exceeds a certain set figure for each sample size, further action, including the issuance of off-sale orders, may be undertaken.

(11) recalculate the total and average error of the sample excluding the unreasonable errors;

(12) "(a) If the total error as obtained from the sample is plus and is less than the value shown in Table III for the corresponding range and sample size, then a shortage may or may not exist, and additional samples may or may

[5]The container and tux board are weighed with all matter adhering to the tare that does not pull off when the bacon is removed included, as well as with any grease or moisture that the tux board may have absorbed from the bacon. This is "wet tare."

not be taken, depending upon the discretion of the weights and measures official. If no additional samples are taken then the procedures as set forth in the following sections shall govern the disposition of the lot.

"(b) If the total error obtained from the sample is less than the above-determined value, and the error is minus, then a shortage may or may not exist, and additional samples may or may not be taken, depending upon the discretion of the weights and measures official. If no additional samples are taken the lot shall be passed. If additional samples are taken then the procedures as set forth in the following sections shall govern the disposition of the lot." [Sec. 2933.3.12.]

If an inspector cannot pass the lot based on this sampling technique or after retesting, he then may order the lot off-sale under the provisions of California Business and Professions Code §12211:

Each sealer shall, from time to time, weigh or measure packages, containers or amounts of commodities sold, or in the process of delivery, in order to determine whether the same contain the quantity or amount represented and whether they are being sold in accordance with law.

* * * *

Whenever a lot or package of any commodity is found to contain, through the procedures authorized herein, a less amount than that represented, the sealer shall in writing order same off sale and require that an accurate statement of quantity be placed on each such package or container

> before the same may be released for sale by the sealer in writing. The sealer may seize as evidence any package or container which is found to contain a less amount than that represented.

Evidence was adduced at the trial from various California officials, including Becker, that the county departments do not recognize variations in net weight that result from water loss during good distribution practice. Mr. Cervinka, a statistician employed by the California Department of Agriculture, testified on direct examination as an expert for Christensen that Art. 5 of the regulation, described above, is a statistically valid procedure. On cross-examination he indicated that Art. 5 does not make any distinction between products that lose water and those that do not, nor does it make provision for any weight reductions during the course of handling. On this and other evidence the district court concluded that Art. 5 uses "absolute" weight as determined by statistical methods as its measure of compliance and makes no reference in describing the steps of the weighing and calculating process to reasonable variations from label weight caused by "loss * * * of moisture during the course of good distribution practice." The district court's fact findings have substantial evidentiary support and are not clearly erroneous. F.R.Civ.P. 52(a). Becker, Christensen, and Jones do not urge error in the district court's construction of Art. 5.

Procedural History

During the period September 1971 to March 1972 inspectors under the supervision of Becker and Jones visited supermarkets in Los Angeles and Riverside

Counties and weighed packages of Rath bacon to determine compliance with the State statute and regulations concerning net weight labeling. Becker's representatives ordered approximately 84 lots of bacon off sale for short weight; Jones ordered nearly 400 packages of Rath bacon off sale in the period September 29 to December 30, 1971, for the same reason.

On February 17, 1972, the Riverside County Counsel brought an action in the name of the People against Rath in the Superior Court for Riverside County for an injunction under Cal. Civ. Code §3369[6] and for civil penalties under Cal. Bus. and Prof. Code §17536,[7] alleging that Rath had committed acts of unfair competition in violation of Cal. Bus. and Prof. Code §17500[8] by distributing for sale in Riverside County super-

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[6]Civil Code §3369 provides in material part:

> 2. Any person performing or proposing to perform an act of unfair competition within this State may be enjoined in any court of competent jurisdiction.
>
> 3. As used in this section, unfair competition shall mean and include * * * any act denounced by Business and Professions Code Section 17500 to 17536, inclusive.

[7]Section 17536:

> (a) Any person who violates [§17500] shall be liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction.

[8]Section 17500:

> It is unlawful for any * * * corporation * * * to make or disseminate or cause to be made or disseminated before the public in this State, any representation * * * in any * * * manner or means whatever, concerning * * * personal property * * * or concerning any circumstances or matter of fact connected with the * * * disposition thereof, and which is known, or which by the exercise of reasonable care should be known, to be true or misleading * * *.

markets the packages of bacon that Jones' representatives had ordered off sale. On March 1, 1972, the Los Angeles County Counsel filed a similar action against Rath in the Superior Court for Los Angeles County.

Rath removed both actions to federal district court within a week thereafter; but on March 20, 1972, the district court remanded the actions to the State courts, finding, at least with respect to the Riverside action, that there was no diversity of citizenship and that "[n]o substantial federal question is presented on the face of the pleadings."

Meanwhile, on March 17, 1972, Rath filed two actions in federal district court, one against the People[9] and Becker, the other against Jones. Rath requested declarations that the California statutes and regulations impose labeling standards on meat food products prepared by Rath that are in addition to or different than the standards of the Wholesome Meat Act of 1967, specifically 21 USC, §601(n)(5) and 9 CFR 317.2(h)(2) and that California could not impose weight labeling requirements on Rath meat food products after they left the Rath plant. Rath also requested injunctions against the enforcement by Becker and Jones of labeling requirements in addition to or different than those in the Act and against the ordering off-sale or otherwise preventing the sale of Rath products for failure of the products to bear an accurate label in terms of net weight after they have left Rath's

[9]The People were dismissed as a party by the district court on the ground that the Eleventh Amendment bars suits against the State of California by a citizen of another State. Rath is an Iowa corporation and is a citizen of Iowa for this purpose. No appeal was taken from this dismissal.

plant. Becker, Jones, and Christensen counterclaimed for the same relief sought by the State in the state court actions.

After the remands, on March 30, 1972, Rath answered the state court complaints and filed cross-complaints seeking the same relief, in virtually the same language, as Rath sought in federal court. In July 1972 Christensen intervened in both the state and federal court litigations.

Becker filed in the district court motions requesting the court either to abstain from deciding the federal court action or to stay the federal action pending final determinations in the state court actions. The district court denied these motions in May 1972. On November 14, 1972, the superior court in the Riverside action dismissed Rath's cross-complaint; Rath appealed. On the very next day, Christensen and Becker moved the district court to dismiss Rath's action or to stay it pending decision on Rath's state appeal. The district court denied the motions, and this court, on Christensen and Becker's petition for a writ of prohibition, declined to disturb the district court's assumption of jurisdiction.

On April 3, 1973, the district court, after a trial on the merits of Rath's action against Becker and on cross-motion for summary judgment in the action against Jones, entered judgment declaring Cal. Bus. and Prof. Code §12211 and 4 Cal. Admin. Code ch. 8, subch. 2, Art. 5 to be preempted by federal law and enjoining their enforcement. In the course of its Memorandum the court held that 9 CFR 317.2(h)(2) was invalid, and that thus the sole federal labeling standard was "accurate" weight. The court also held

that accurate weight labeling standards could be applied to packages of meat and meat food products at the retail level. Cross-appeals were taken to this court.

The Riverside action continued, and in January 1974, while Rath's first appeal was still pending in the California District Court of Appeal, the superior court entered summary judgment on the complaints of Jones and Christensen against Rath; Rath appealed again. In an unreported decision in April 1974 on Rath's first appeal, the California appellate court reversed the dismissal of Rath's cross-complaint against Jones, holding that the federal court's judgment was *res judicata* on the issue of the validity of §12211 and Art. 5 (to the extent that it implemented §12211). On Rath's second appeal, in December 1974, the appellate court reversed the grant of summary judgment on the complaints and remanded the case to the Riverside superior court for trial, holding that there existed issues of fact that required trial. *People v. Rath Packing Company*, 44 Cal. App. 3d 56, 118 Cal. Rptr. 438 (1974). The appellate court also explained further the basis of its decision on Rath's first appeal, holding that the effect of the federal court judgment was to preclude relitigation of the narrow issue of the preemption of §12211, and its implementation in Art. 5, by the Wholesome Meat Act. The appellate court held, 118 Cal. Rptr. at 446 n. 6, that Art. 5 is not unconstitutional.

Although the record does not contain any notice of the proceedings in the Los Angeles superior court action, we are informed by Rath's reply brief that in February 1974 the Los Angeles court gave *res judicata* effect to the final judgment on the preemption issue and decided in Rath's favor the issues of constitutionality and whether Becker's ordering of Rath's bacon

off sale complied with state law. An appeal from this judgment is pending.

I.

Becker, Jones, and Christensen contend that the district court lacked jurisdiction of the subject matter before it, and, in the alternative, that the principles of abstention and comity required the court to stay its hand until the state court actions had proceeded to judgment. We reject both contentions.

A.

The question of subject matter jurisdiction may be raised by the parties at any time or by the court sua sponte. *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1938); F.R.Civ.P. 12(h)(3). Becker et al. first contend that the declaratory judgment actions brought by Rath are nothing more than attempts to get collateral review of the remands to state court of the actions brought against Rath by the People which Rath had removed to the district court. 28 USC, §1447, provides:

> §1447. *Procedure after removal generally.*
>
> * * * *
>
> (d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise * * *.

Their second contention is that Rath's claim for declaratory and injunctive relief in the district court is in reality a defense to the state court actions, and, as such, cannot form a basis for federal question jurisdiction under 28 USC, §1331.

After the institution of Rath's federal action Becker et al. presented these contentions to this court by

way of a petition for a writ of prohibition, *Becker et al. v. Real,* No. 72-3037, which the court, Ely and Hufstedler, Circuit Judges, denied.[10] We find no reason to depart from that decision.

Federal question jurisdiction is determined by the federal district court solely from the face of plaintiff's complaint. *Gully v. First National Bank,* 299 U.S. 109 (1936). Removability cannot be created by defendant pleading a counter-claim presenting a federal question under 28 USC, §1331. See 1 Barron & Holtzoff, *Federal Practice and Procedure* (Wright Ed.) §102; *United Artists Corp. v. Ancore Amusement Corp.,* 91 F. Supp. 132 (S.D. N.Y. 1950). Thus, Rath's answer and cross-complaint in the state court, raising its claim for declaratory and injunctive relief under federal law, were not[11] before the district court when it remanded the removed state court actions and do not raise any issues necessarily adjudicated by the court in deciding to remand. The decision of the district court that the case does not invoke the federal jurisdiction and must be remanded precludes further litigation of the issue of the forum in which the *removed case* is to be litigated. *Missouri Pacific Ry. Co. v. Fitzgerald,* 160 U.S. 556, 583 (1896). The decision of the district court to remand has no bearing on the merits of

[10]"It appearing from the face of the pleading that the District Court has jurisdiction, the petition is denied. This Court does not, however, now express any further opinion on the merits of the controversy."

We are not foreclosed by this order from reexamining the jurisdictional issue at this time; we merely find the decision to be sound.

[11]And could not have been, since the remand order was entered March 20, 1972, and Rath's claims were first presented in the state court actions on March 30, 1972.

the underlying claims. Since the district court did not make any decision with respect to the propriety of a federal forum for *Rath's* claims, we cannot say that the maintenance of Rath's claim in federal court works a circumvention of 28 USC, §1447(d). Cf. *Chandler v. O'Bryan,* 445 F.2d 1045, 1057 (10th Cir. 1971). Rath is not contending that the remand orders were erroneous, but only that it has a right to a federal forum for its alleged federal claims.

The argument that Rath's claims are not within the federal question jurisdiction, it not being denied that there is no diversity of citizenship, takes its roots in the statement of the Supreme Court in *Public Service Commission v. Wycoff,* 344 U.S. 237, 248 (1952):

> Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, *it is the character of the threatened action, and not of the defense,* which will determine whether there is a federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, *if that right is in reality in the nature of a defense to a threatened cause of action.* Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law * * * (emphasis added [by the Court]).

The doubt that the Court expresses is still with us, e.g., C. Wright, *Law of Federal Courts* §18, at 62 (2d Ed. 1970).

In order to appreciate the *Wycoff* case we must first look to the jurisdictional background of the Declaratory Judgment Act, 28 USC, §2201.[12] The Act is procedural only, creating a new federal remedy without expanding the jurisdiction of the federal courts. *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227 (1937). " 'Jurisdiction' means the kinds of issues which give right of entrance to federal courts." *Skelly Oil Co. v. Phillips Petroleum Co.,* 339 U.S. 667, 671 (1950). The *Wycoff* "test" quoted supra has its origins in *Tennessee v. Union & Planters' Bank,* 152 U.S. 454, 464 (1894), where the Court said, "a suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws." Furthermore, the complaint of the declaratory plaintiff must present a federal question "unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Taylor v. Anderson,* 234 U.S. 74, 75-76 (1914).

In *Wycoff* the complainant brought an action for declaratory judgment against the Utah Public Service Commission, requesting a finding that the business

[12]§2201 provides:

> In a case of actual controversy *within its jurisdiction,* except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. * * *. (Emphasis added.)

conducted by complainant in carrying goods between points in Utah was interstate commerce (and thus not subject to regulation by the Commission). The principal concern of the Court was the nature of the controversy presented, 344 U.S. at 244;

> A multitude of rights and immunities may be predicated upon the premise that a business consists of interstate commerce. What are the specific ones in controversy? The record is silent and the counsel little more articulate. We may surmise that the purpose to be served by a declaratory judgment is ultimately the same as respondent's explanation of the purposes of the injunction it originally asked, which is "to *guard against the possibility* that said Commission would attempt to prevent respondent from operating under its certificate from the Interstate Commerce Commission." (Emphasis supplied [by the Court].)

From this the Court concluded that "this dispute has not matured to the point where we can see what, if any, concrete controversy will develop." 344 U.S. at 245. In the portion of *Wycoff* quoted three paragraphs above, the Court was applying its concern that the controversy was not ripe for adjudication by pointing out a declaratory plaintiff may not *create* a controversy by seeking to have a federal court adjudicate federal defenses he might assert in a proceeding before a state court or administrative tribunal which is not ripe, but which is merely threatened or impending.[13]

[13]The Court confirmed this view of *Wycoff in Public Utilities Commission of California v. United States,* 355 U.S. 534, 538-39 (1958):

(This footnote is continued on next page)

Another aspect of the matter was aired in *Chandler v. O'Bryan*, supra. O'Bryan brought a libel action in Oklahoma state court against Chandler, a United States District Judge, on statements made by Chandler to a newspaper accusing O'Bryan of bribing judges of the Oklahoma Supreme Court. Chandler removed the action to federal district court; but the district court held that the acts alleged in the complaint were not done in performance of Chandler's official duties as a federal judge, nor were they done under color of judicial office, and remanded the case to the state court for lack of a federal question, there being no diversity of citizenship. It is settled that Chandler's judicial immunity defense arises under federal law. *Howard v. Lyons*, 360 U.S. 593 (1959). A verdict for O'Bryan was returned in the state court. Chandler then filed a declaratory judgment action in federal court seeking to have the state libel judgment enjoined and expunged, alleging his federal judicial immunity claim. The district court granted relief to Chandler, 311 F. Supp. 1121 (W.D. Okla. 1969), but the 10th Circuit (by a panel of three judges of the 8th Circuit) reversed.

The court found *Wycoff* directly applicable, and held that Chandler was seeking a separate federal adjudication of a matter which was "in reality in the nature of a defense" to the state court libel action,

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The Commission has plainly indicated an intent to enforce the Act; and prohibition of the statute is so broad as to deny the United States the right to ship at reduced rates unless the Commission first gives approval. The controversy is present and concrete—whether the United States has the right to obtain transportation service at such rates as it may negotiate or whether it can do so only with state approval.

which was based solely on state libel law and raised no federal question itself. The action was dismissed for lack of federal jurisdiction.

The instant case is different. While it is true that judgment in Rath's favor affects the results of the Los Angeles and Riverside actions, we cannot say that Rath's action is premature or that Rath's claim is merely a defense to the state court actions. The ordering off-sale of Rath's products in September 1971 and afterward and the upward adjustment of the pass range at the sealing station at Rath's plant, increasing the overpack of bacon necessitated by California weighing procedures, it was stipulated below, caused Rath a loss of more than $10,000. The off-sale orders themselves are sufficient State action to create an actual controversy between Rath and the state weights and measures officials. See *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 508 (1972). The present controversy was not created by the institution of the state court actions against Rath, but arose independently thereof by virtue of the off-sale orders.

Unlike *Chandler*, Rath's claims have vitality in the absence of the litigation in state court; Rath had the right to a federal forum before the institution of the state court actions. Chandler's federal claim was purely in the nature of a defense to the libel action. Brought without reference to the underlying state court proceeding, Chandler's claim would be a useless gesture: no one would care whether Chandler acted under the protection accorded by the courts to his office if O'Bryan had refrained from suing him. That Rath's claim is or can be the basis for a defense to the state court actions states a mere

truism,[14] the test is whether Rath has created a federal controversy where none existed or is seeking an adjudication of a claim which is essentially meaningful only when pleaded as a defense to the particular pending state court actions. We find neither factor present and consider that Rath has stated claims which are within the federal jurisdiction conferred on the district court by 28 USC, §1331.[15]

B.

We also hold that considerations of comity and abstention did not require the district court to relinquish jurisdiction.

Comity is a principle of long standing:

> We live in the jurisdiction of two sovereignties, each having its own system of courts to declare and enforce its laws in common territory. It would

[14]Becker, Jones, and Christensen do not assert that Rath's cross-complaints in the state court actions were compulsory under Cal. Code of Civ. Proc. §428.10; they assert that they were *improper* pleadings under the statute. We have no opinion on this matter of state procedure, but it does seem to us to show that the interposition of affirmative claims by Rath in the state courts is not a relevant factor in determining whether the federal courts have jurisdiction of Rath's affirmative claims.

[15]Jones' argument that the district court improperly assumed jurisdiction of a *res* already in the control of the state courts is without merit. Suits for injunctions are *in personam,* not *in rem, Penn General Casualty Co. v. Pennsylvania,* 294 U.S. 189, 195 (1935), and state and federal courts having concurrent jurisdiction are "free to proceed in [their] own way * * *, without reference to the proceedings in the other court. * * * The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded." *Kline v. Burke Construction Co.,* 260 U.S. 226, 230 (1922). We observe that in any case Rath's claims were made in district court thirteen days before Rath's state cross-complaints were filed. The controversy here

> be impossible for such courts to fulfil their respective functions without embarrassing conflict unless rules were adopted by them to avoid it. The people for whose benefit these two systems are maintained are deeply interested that each system shall be effective and unhindered in its vindication of its laws. The situation requires, therefore, not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things in actual litigation, but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure.
>
> * * * *
>
> The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy to attain which it assumed control, before the other court shall attempt to take it for its purpose. *Ponzi v. Fessenden,* 258 U.S. 254, 259-60 (1921).

This circuit has defined the rule of comity as "merely recognizing exclusive jurisdiction in the court first acquiring jurisdiction of any action." *Gregg v. Winchester,* 173 F.2d 512, 513 (9th Cir. 1949). Under these rules and in the present circumstances, the principle of comity does not suggest that the district court should have declined to hear Rath's claims. The subject matter of the litigation before us consists of the *federal*

is not over any property right or status in the *bacon,* but over the enforcement of state laws which affect how the bacon is sold.

questions raised by Rath in its complaint. These federal questions were first taken into the control of a court when Rath filed its complaint in the district court on March 17, 1972. No state court could have acquired jurisdiction over this subject matter until Rath answered and filed its cross-complaints in the state courts on March 30, 1972. Our conclusion is reinforced by the actions of the District Court of Appeal in the Riverside action twice giving *res judicata* effect to the federal district court judgment. If, as Becker and Christensen contend, the only matter preventing the first Riverside judgment, dismissing Rath's cross-complaint against Jones, from being given preclusive effect as a final judgment is Cal. Code of Civ. Proc. §1049,[16] the California appellate court would not have directed the trial court to abandon its position and to follow the federal judgment, which, since it had been appealed, was just as "final" as the Riverside judgment if evaluated under California law. We do not see here the federal-state conflict that the comity doctrine seeks to avoid. The district court acquired jurisdiction over the federal question prior to the state courts, and very scrupulously avoided deciding even tangentially the constitutionality of the California statutes and regulations or whether the actions of the inspectors were in compliance with state law. The state courts have not questioned the right of the district court to take the action it did and held the federal judgment entitled to preclusive effect in the state courts on the particular issues litigated in the federal court.

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[16]Cal. Code of Civil Procedure §1049:

> An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, * * *

In applying the abstention doctrine a federal district court has *discretion* in *declining* to exercise or *postponing* the exercise of jurisdiction it already has in deference to a state court resolution of underlying issues of state law. *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Abstention is appropriate only where the issue of state law is uncertain, *Harman v. Forssenius,* 380 U.S. 528 (1965), and where "the delay and expense to which the application of the abstention doctrine inevitably gives rise" can be justified. *England v. Board of Medical Examiners,* 375 U.S. 411, 418 (1964). However, abstention is not automatic whenever a question of state law may be involved. As the Court said in *Baggett v. Bullitt,* 377 U.S. 360, 376-77 (1964), a case in which the Court considered abstention to be unnecessary:

> In the bulk of abstention cases in this Court, * * * the unsettled question of state law principally concerned the applicability of the challenged statute to a certain person or a defined course of conduct, whose resolution in a particular manner would eliminate the constitutional issue and terminate the litigation.

This statement reflects the judicial policy of avoiding the adjudication of federal constitutional questions unless they are ripe and are squarely presented by the record.

"The basic question involved in [federal preemption] cases, however, is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes." *Swift & Co. v. Wickham,* 382 U.S. 111, 120 (1965). Thus we do not have a situation where a state law interpretation by a state court may

eliminate a federal constitutional question. Cf. *Reetz v. Bozanich*, 397 U.S. 82 (1970). There is no contention by Becker, Jones, or Christensen that California law is unclear or ambiguous or that the construction of California law in the state courts will obviate a decision on Rath's federal preemption claim. The California statutes and regulations apply to Rath without question. We think this case is akin to *Harman v. Forssenius*, supra, in which the Court said: "If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary or substantially modify the federal * * * question, it is the duty of the federal court to exercise its properly invoked jurisdiction. *Baggett v. Bullitt*, 377 U.S. 360, 375-379." We hold that the district court did not abuse its discretion in refusing to abstain.

II.

In holding 9 CFR 317.2(h)(2) invalid, the district court said:

> [The section] is void for its inadequacy to set any recognizable standard upon which any individual may measure his conduct or his compliance with the law by which he must order his personal or business life. 357 F. Supp. at 534.

Rath alleges two bases of error: (1) the validity of the regulation was not put in issue by the parties below and should not have been considered by the district court; and (2) the district court erred on the merits of the issue.

Rule 16 of the Federal Rules of Civil Procedure provides that "[t]he court shall make an order * * *

which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and *such order* when entered *controls the subsequent course of the action* unless modified at the trial to prevent manifest injustice." [Emphasis added.] The pretrial order entered by the court with the consent of the parties in the Becker action does not name as an issue the validity of 9 CFR 317.2(h)(2); nor, for that matter, do the pleadings and motion papers in the Jones action. The first appearance of the issue in the Jones action was at the argument on the motions for summary judgment:

> THE COURT: The question is, is the regulation, and that is (h)(1) and (2) and particularly (2), that is 317.2(h)(2), is it a valid regulation.
>
> MR. KEIR [Counsel for Jones]: Well, we don't challenge the validity of (h)(2).
>
> THE COURT: You don't? You don't? I have some serious questions about it.
>
> MR. KEIR: Maybe I should retract that for the record. Frankly, I hadn't considered whether it is valid or not. I merely submit to the court, and this is the position we have taken right along, is that (h)(2) is an innocuous provision.

It was not until the close of the trial of the Becker action that the district judge requested argument on the issue, and by so doing put the issue before the parties.

Ordinarily, issues not squarely presented in the pleadings and motion papers or not preserved in the pretrial order are considered to have been eliminated from an action. See, *e.g.*, *L & E Co. v. United States*

ex rel. Kaiser Gypsum Co., 351 F.2d 880 (9th Cir. 1965); *Fowler v. Crown Zellerbach Corp.*, 163 F.2d 773 (9th Cir. 1947; see also 3 *Moore's Federal Practice* ¶16.19. This is particularly true in a declaratory jdugment action, where the court is called upon to adjudicate only those matters as to which the parties ask that their rights be determined. In this case, however, the parties have fully briefed and argued this issue both here and before the district court. In their consolidated post-trial memorandum, Becker and Christensen requested a declaration that 9 CFR 317.2(h)(2) was invalid. Rath does not claim that the court's *consideration* of the issue—as opposed to its *decision* on the issue, with which Rath differs—has resulted in any actual prejudice to it, nor did Rath object in its reply brief in the district court to consideration of the issue. By failing to object, Rath may be deemed to have acquiesced in an expansion of the issues by the court from those set forth in the pretrial order. Furthermore, the issue, as discussed below, is one of "facial" invalidity under the 5th Amendment which does not require a fully developed evidentiary basis for its resolution. Cf. *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947). We note the public importance of this question, and the possibility of review of our judgment herein. Since a controversy presently exists between the parties on the issue, and since the judgment of the district court turned in large part on its resolution of this issue, we proceed to the merits of the controversy.

Although we have some doubts as to the applicability of the "void-for-vagueness" doctrine in its traditional formulation[17] to this non-criminal situation, the parties do not question the doctrine's applicability to this case. However, we need not decide its applicability, since we are of the opinion that the regulation passes muster when the due process standards enunciated by the criminal cases in the economic area are applied to it. There is no claim that 1st Amendment rights are involved, the presence of which would necessitate stricter scrutiny by us. *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974).

The crux of the district court's holding of invalidity can be found in the following [357 F. Supp. at 534]:

> What [*United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77 (1932)], *supra*, is telling us is that the *statutory* delegation is viable. It does not give viability to a redelegation that is subject to varying degrees of reasonableness. The statute gives the Secretary the power of definition of "reasonable variations." The Secretary here has completely failed to accept the duty that can be expressed only in rules and regulations properly promulgated pursuant to federal laws. [Footnote omitted; emphasis in original.]

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[17] *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926):

> That the terms of a *penal* statute creating a new *offense* must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that

(This footnote is continued on next page)

Neither the statute nor the regulations contain quantitative statements of what variations will be considered reasonable.[18] There is likewise no evidence tending to show how much weight variation is considered reasonable by the trade. In the absence of evidence of how the regulation is applied, the burden rests on the parties challenging the regulation, Becker and Christensen, to show that the regulation is incapable of setting a standard of enforcement on its face.[19] Their challenge fails for two independent reasons, which correspond to the separate rationales underlying the portions of the district court's opinion reproduced supra.

The district court seems concerned with "reasonableness" as a standard for guiding conduct. This standard is of ancient provenance in English and American law and is not obnoxious in itself to the Fifth Amendment of the Constitution. In the ordinary negligence case, for instance, the sole difference between no liability and sizeable penalty in the form of damages may be whether the acts in issue are considered those of a *reasonable* man by a jury long after the fact. A more telling analogy is found in the criminal applica-

men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. [Emphasis added.]

See also *United States v. Harriss,* 347 U.S. 612, 617 (1954).

[18]Rath offered as evidence a USDA manual purporting to contain the quantitative variations to be permitted by USDA inspectors, which the court excluded as irrelevant and as not having been promulgated by the Secretary of Agriculture under the Wholesome Meat Act by publication in the Federal Register. Rath does not urge this ruling as error, and we shall not comment on it. Except for this manual, however, Rath concedes that the quantitative scope of "reasonable variations" recognized by the Secretary is nowhere set forth in any writing.

[19]*United States v. National Dairy Products Corp.,* 372 U.S. 29, 32-33 (1963).

tion of the Sherman Act, 15 USC, §1 et seq. The English courts distinguished legal from illegal contracts restraining trade by whether the restraint imposed was reasonable. *Mitchel v. Reynolds,* 1 P. Williams 181, 24 Eng. Rep. 347 (King's Bench, 1711); see discussion in *United States v. Addyston Pipe & Steel Co.,* 85 Fed. 271 (6th Cir. 1898), *mod. and aff'd.,* 175 U.S. 211 (1899); and *Standard Oil Co. v. United States,* 221 U.S. 1, 51 (1911). *Standard Oil,* supra, construed the prohibition of the Sherman Act against "[Any] contract, combination * * *, or conspiracy, in restraint of trade * * *," to apply only to those restraints which are unreasonable as understood in the common law. When the criminal application of the Sherman Act was challenged, in *Nash v. United States,* 229 U.S. 373 (1912), on the ground that "the crime defined by the statute contains in its definition an element of degree as to which estimates may differ," Mr. Justice Holmes, speaking for the Court, said:

> But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. * * * We are of opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act. 229 U.S. at 378-79.

See also *United States v. Ragen,* 314 U.S. 513, 523-24 (1942). More recently, the Supreme Court upheld against a constitutional challenge a criminal proceeding

under §3 of the Robinson-Patman Act, 15 USC, §13a, which makes it a crime to sell goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor." *United States v. National Dairy Corp.*, 372 U.S. 29, 34-36 (1963).[20] We conclude, therefore, that the regulation, which permits "reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practices," has not been shown by the parties claiming its invalidity to be impossible of application without depriving those to whom it is applied fair notice of the practices which are not within the permission of the regulation. The nature of the recognized variations is clearly set forth; Becker, Jones, and Christensen have not alleged that those subject to the regulation, such as Rath,[21] could not perceive the conditions under which the regulation would permit reasonable variations in weight to be recognized. The characterization of the recognized variations as "reasonable" is not constitutionally infirm in itself, as the cases show.

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[20]The Court did not uphold the statute on its face, but only as applied to the acts charged in the indictment. The Court did, however, distinguish the case from *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921), in which a statute proscribing "any unjust or unreasonable rate or charge" was invalidated. The Court saved §3 by finding that the statute made clear reference to the nature of the conduct prohibited, i.e., that which was intended to destroy competition, etc. 372 U.S. at 35.

[21]9 CFR 302.1(a) provides:

> (a) Inspection under the regulations in this subchapter [which includes 317.2(h)(2)] is required at:
>
> (1) Every establishment * * * in which any products of * * * carcasses of livestock * * * are prepared for transportation or sale as articles of commerce, which are intended for use as human food.

Our conclusion is confirmed by the holding of the Supreme Court in *Parker v. Levy*, 417 U.S. 733 (1974), that Article 134 of the Uniform Code of Military Justice, which punishes "[a]ll disorders and neglect to the prejudice of good order and discipline in the armed forces," is not void for vagueness. See also *Ricci v. United States*, 507 F.2d 1390 (Ct. Cl. 1974). Application of the regulation, *as gauged on this record*, does not offend the due process clause of the 5th Amendment, as it has not been shown that the regulation fails to give fair notice of the variations to be permitted under it.

The second prong of the district court's criticism of the regulation is that it constitutes an impermissible redelegation to USDA field inspectors of the authority granted by Congress to the Secretary to determine what variations caused by gain or loss of moisture, etc., were to be permitted. This conclusion is error, as the legislative history and precedent demonstrate.

In enacting the Wholesome Meat Act of 1967, Congress made additions to the statutory framework underlying federal meat inspection programs and standards. In particular, Congress created a series of definitions modeled on the definitions used in the Food, Drug, and Cosmetic Act, 21 USC, §301 et seq. In S. Rep. No. 799, 90th Cong., 1st Sess.,[22] the Committee said with respect to Sec. 1(n) of S. 2147, which became 21 USC, §601(n), the statutory basis of the questioned regulation:

> (n) *Misbranded.*—The definition of this term not heretofore used in the Meat Inspection Act,

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[22]2 *U.S. Code, Cong. and Admin. News*, 90th Cong., 1st Sess., pp. 2188-2213 (1967).

is discussed in connection with section 12. It is based on the definition of the same term in the Federal Food, Drug, and Cosmetic Act and is identical except that—

> In new section 1(n)(5) the introductory phrase is slightly different in that it refers to "other container" besides packages and requires a label "showing" rather than containing" specified information; and in the proviso, reasonable variations and exemptions "may" instead of "shall" be allowed by the Secretary of Agriculture instead of the Secretary of Health, Education, and Welfare. Also an internal reference to a clause is made in different terms than in the Federal Food, Drug, and Cosmetic Act.

* * * *

It is therefore proper for us to consider the history and construction of the Food, Drug, and Cosmetic Act prior to 1967 in interpreting the scope of the Secretary's power to promulgate regulations.

In *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77 (1932), the Supreme Court had occasion to construe the Food and Drug Act and regulations thereunder, as they were in force at that time. The relevant portion of the Act provided:

> [A]n article of goods shall be deemed misbranded—
>
> * * * *
>
> Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: *Provided, however,* That reasonable variations shall be permitted and tolerances and also exemptions as to small packages shall be established, by rules and regulations made in accordance with * * * this Act.

The regulation stated:

> (i) The following tolerances and variations from the quantity of the contents marked on the package shall be allowed:
>
> (1) Discrepancies due exclusively to errors in weighing, measuring, or counting which occur in packing in compliance with good commercial practice.
>
> * * * *
>
> (3) Discrepancies in weight or measure, due exclusively to differences in atmospheric conditions in various places, and which unavoidably result from the ordinary and customary exposure of the packages to evaporation or to the absorption of water.
>
> Discrepancies under classes (1) and (2) of this paragraph shall be as often above as below the marked quantity. The reasonableness of discrepancies under class (3) of this paragraph will be determined on the facts in each case.

The resemblance between the present statute and regulation and the statute and regulation in force in 1932 is apparent.

The Court held that the substantive standard created by the Act was that packages be marked plainly and conspicuously with their weights, and that the statutory proviso gave the involved Secretaries the administrative

authority to permit reasonable variations from this hard and fast rule. The Court continued [287 U.S. at 84]:

> Moreover, the practical and long continued construction of the executive departments charged with the administration of the act and with the duty of making the rules and regulations therein provided for, has been in accordance with the view we have expressed as to the meaning of the section under consideration. The rules and regulations, as amended on May 11, 1914, deal with the entire subject in detail under the recital, "(i) The following tolerances *and variations* [italics supplied] from the quantity of the contents marked on the package shall be allowed: . . ." Then follows an enumeration of discrepancies due to errors in weighing which occur in packing conducted in compliance with good commercial practice; due to differences in capacity of bottles and similar containers, resulting from unavoidable difficulties in manufacture, etc.; or in weight due to atmospheric differences in various places, etc. These regulations, which cover variations as well as tolerances and exemptions, have been in force for a period of more than eighteen years, with the silent acquiescence of Congress.

The Court did not question the authority of the Secretary to promulgate the regulation. In the forty-two years since the *Shreveport Grain* case Congress has not changed its delegation of authority to the Secretary to "permit reasonable variations," nor have the regulations promulgated expressly under that authority included any quantitative expressions of the variations to be permitted.

The question, therefore, is: Has the Secretary failed to heed the intent of Congress in giving him authority to permit reasonable variations by declining to put numerical limits on the variations he and his representatives will permit in the enforcement of the substantive standard of the Act? In the Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, Congress reenacted the provisions of the prior Act in substantially identical terms to those before the Court in *Shreveport Grain.*[23] It has been held that Congress gives a regulation the force and effect of law by reenactment of the statutory provision to which it pertains. *Helvering v. R. J. Reynolds Tobacco Co.,* 306 U.S. 110 (1939). We note also the presumption that reenactment of a statutory provision by Congress without significant change indicates its approval of prior judicial interpretation of that provision. *United States v. Douglas Aircraft Co.,* 510 F.2d 1387 (CCPA 1975). Becker, Jones, and Christensen have adduced nothing to overcome the conclusion that the regulation is a valid exercise of the authority delegated to the Secretary by Congress. The regulation must be presumed valid, and the burden is on those contending its invalidity to persuade us otherwise. Forty-two years of Congressional silence is strong evidence that Congress has acquiesced in the Secretary's interpretation of the scope

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[23]Sec. 403. A food shall be deemed misbranded—

* * * *

(e) If in package form unless it bears a label containing * * * (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided,* That under clause (2) of this paragraph reasonable variations shall be permitted and exemptions as to small packages shall be established by regulations prescribed by the Secretary.

of his powers. See *Flood v. Kuhn,* 407 U.S. 258, 283 (1972); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381 (1969). We do not, for the above reasons, concur in the district court's analysis of *Shreveport Grain,* and hold that the district court erred in finding 9 CFR 317.2(h)(2) invalid.

III.

The central issue in this litigation is whether sections of the California statute and regulations promulgated thereunder are preempted by the Wholesome Meat Act of 1967 and 9 CFR 317.2(h)(2). The district court based its holding of preemption on its finding that the statistical variations allowed by California from the accurate weight standard imposed by 21 USC, §601(n)(5), in the absence of valid regulations permitting reasonable variations thereunder, created a net weight labeling standard "different than" the federal standard. We agree with the holding, but not with the reasoning on which it was based.

"Our principal function is to determine whether, under the circumstances of this case [the state regulations and] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the Wholesome Meat Act and delegating to the Secretary the power to make regulations thereunder. *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). The inquiry in this case will follow the lines set forth in *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142 (1963):

> The principle to be derived from our decisions is that federal regulation of a field of commerce

> should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakenly so ordained.

21 USC, §678, was enacted as part of the Wholesome Meat Act of 1967, Pub. L. 90-201, §408, 81 Stat. 600. We are of the opinion that in it "Congress has unmistakenly so ordained." Accord, *Armour and Company v. Ball,* 468 F.2d 76 (6th Cir. 1972). This conclusion follows from the clear language and legislative history of 21 USC, §678. The first part of the section reads in relevant part:

> Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are *in addition to, or different than those made under this chapter may not be imposed by any State* * * *, except that any such jurisdiction may impose record-keeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. Marking, *labeling,* packaging, or ingredient *requirements in addition to, or different than,* those made under this chapter may not be imposed by any State * * * with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter * * *. [Emphasis added.]

The report of the Senate Committee, S. Rep. No. 799, 90th Cong., 1st Sess., states:[24]

> The committee feels that Federal standards must be required of all meat and meat food products sold for human consumption in this country.
>
> * * * *
>
> However, the committee wants it clearly understood that the requirements on wholesomeness, additives, labeling, and the other Federal regulations are not to be compromised and must be at least equal to Federal standards.
>
> * * * *
>
> Section 408 [codified at 21 USC, §678] would exclude States * * * from imposing marking, labeling, packaging, or ingredient requirements in addition to or different than those under the Federal Meat Inspection Act for articles prepared in accordance with title I of the act * * *.

This language clearly shows the intent of Congress to create a uniform national labeling standard, under the definitions set forth in the Wholesome Meat Act, including the definition of "misbranding" in §601(n). The express language of §678 implements this clear Congressional intent.

In the absence of regulations under the Act the statutory labeling[25] standard under the Act is that

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[24]2 *U.S. Code Cong. and Admin. News,* 90th Cong., 1st Sess., 2191, 2207 (1967).

[25]Jones' argument that California imposed no "labeling" requirements, but rather sought to prevent "misbranding" under Cal. Bus. and Prof. Code §12211, is strained. 21 USC §601(n) read as a whole, defines violation of its "labeling" requirements as "misbranding." As we hold below, the federal standards, which include definitions of terms, prevail over conflicting State standards.

the label reflect "accurate" weight, as the district court held. 9 CFR 317.2(h)(2) adds to this federal standard the condition that "reasonable variations caused by loss or gain of moisture during the course of good distribution practices * * * will be recognized." The California statutes and regulations must impose such a standard of labeling on Rath or they are preempted by federal law as requiring weight information on labels "different than" that required by federal law.

Cal. Bus. and Prof. Code §12211 establishes the following standard: "that the *average* weight or measure of the packages or containers in a lot of any such commodity sampled shall not be *less,* at the time of sale or offer for sale, than the net weight or measure stated upon the package." (Emphasis added.) This section also provides for the promulgation of regulations to govern the sampling and weighing procedures. The California regulations, the district court concluded, provide only for a statistical variation from the absolute accurate weight and make no reference to loss of moisture from the packages of bacon (or other products that lose moisture, for that matter) experienced between the time the bacon is weighed in the plant and the time that California inspectors weigh the bacon at the retail store. We agree with the district court that Cal. Bus. and Prof. Code §12211 and 4 Cal. Admin. Code, ch. 8, subch. 2, Art. 5, impose labeling standards "different than" those under federal law and may not be enforced.

Jones, Becker, and Christensen claim that this holding infringes on the legitimate interests of the State of California protecting its citizens from short-weight meat products. We cannot agree. Christensen and Becker

recognized the true situation in their brief: "Christensen and Becker submit that by [21 USC, §678] Congress sanctioned the adoption by the states of laws (statutes and regulations) which impose the same *standard* required by the Wholesome Meat Act * * * and which are enforced by means of state enforcement procedures. (Emphasis in original.) The concluding portion of §678 reads in relevant part as follows:

> * * * but any State * * * may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment * * *. This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

Our holding does not diminish the Congressional grant in §678 to the States of enforcement jurisdiction concurrent with the Secretary over misbranded articles outside federally inspected establishments, *if the States do not impose labeling and other requirements "in addition to or different than" the federal standards when exercising their concurrent jurisdiction.* We have merely held that California cannot exercise its concurrent jurisdiction through the particular standards established by §12211 and Art 5. California is free

to enact other statutes and regulations which do not offend §678. It must be further understood that the only matters at issue are net weight labeling standards; our judgment herein does not pertain to other matters which are or may be regulated by the State of California.

IV.

Rath urges as error the holding of the district court that the federal net weight standard set by 21 USC, §601(n)(5), "can be applied to packages of meat or meat food products at the ultimate end of a meat processor's distribution system—the retail store." Implicit in this holding is that California may exercise the concurrent enforcement jurisdiction permitted it by 21 USC, §678, by the imposition of appropriate standards through the inspection of packages at the supermarket.

Rath's position is at odds with the intent of the Wholesome Meat Act and with the grant of concurrent enforcement jurisdiction to the States. 21 USC, §602, states that "It is essential in the public interest that the health and welfare of *consumers* be protected by assuring that meat and meat food products *distributed to them* are wholesome, not adulterated, and properly marked, labeled, and packaged." (Emphasis added.) 21 USC, §624, gives the Secretary the power to promulgate regulations governing the storage and handling of meat and meat food products "to assure that such articles will not be * * * misbranded *when delivered to the consumer.*" (Emphasis added.)

The emphasized portions make it clear to us that Congress intended to continue the protection provided under the Wholesome Meat Act to the point at which the consumer receives the meat and meat food products subject to the Act, i.e., at the retail food store level.[26]

21 USC, §673(a) provides for federal seizure of misbranded meat and meat food products which are "held for sale [i.e., in a retail store] in the United States after * * * transportation [in commerce]," and §673(b) indicates that federal seizure does not "derogate from authority for condemnation or seizure conferred by * * * other laws." The concurrent jurisdiction granted by 21 USC, §678, to enforce appropriate State standards outside of federally inspected establishments would be a nullity if it were to be construed to prevent State enforcement at a level of distribution which Congress clearly intended to be subject to *non*-exclusive federal regulation.

Rath, however, argues that the federal net weight standard requires that the label be accurate only when the product leaves the establishment, relying on 21 USC, §607(b).[27] Accordingly, says Rath, the State may not require conformance with the federal standard of accurate weight, with reasonable variations, etc., considered, past that point. Such an argument renders meaningless the allowance of reasonable variations for

[26]See also, 9 CFR 317.2(b), promulgated under 21 USC, §601(n)(6), which provides in part:

> [Any label term must be] likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

[27]"(b) All * * * meat and meat food products inspected at any establishment under the authority of this subchapter * * * shall *at the time they leave the establishment* bear * * * the information required under paragraph (n) of section 601 of this title." (Emphasis added.)

gain or loss of moisture *during the course of good distribution practices.* Why would the federal scheme consider distribution practices to be relevant at all if the federal net weight labeling standard applied only at the point at which distribution of the product commenced? We cannot attribute such a restrictive reading to §607(b). Rath's objections are met by the reasonable variations allowance; whatever weight variation results from gain or loss of moisture occurring in the chain of distribution from packing plant to retail store *must,* under 9 CFR 317.2(h)(2), be taken into account in determining whether the net weight labeling of a package at retail complies with the federal standard.

V.

After the district court filed its order enjoining the enforcement of Cal. Bus. and Prof. Code §12211 and 4 Cal. Admin. Code ch. 8, subch. 2, Art. 5, Christensen promulgated a new regulation, Art. 5.1, to

> * * * apply only during the proceedings [of the instant case]. This Article is adopted as a temporary authority to protect California wholesalers, retailers, and consumers against short weight packages of meat and meat products * * *.

The district court refused to modify its order to enjoin the enforcement of Art. 5.1 and Cal. Bus. and Prof. Code §12607, the alleged statutory authority for the regulation. Rath requests us to enlarge the declaration and injunction to hold invalid and enjoin the enforcement of these provisions as well.[28]

[28]Rath did not appeal separately from the denial of its motion to amend the judgment. The issue was preserved by Rath's initial notice of appeal, since the injunction granted

(This footnote is continued on next page)

§12607 provides:

> Whenever a consumer commodity is offered for sale, exposed for sale, or sold without a statement of net quantity appearing thereon * * *, the sealer shall in writing order the commodity off sale and require that a correct statement of net quantity be placed on the commodity before the same may be released by the sealer.

This section, standing by itself, is innocuous if "net quantity" is a designation of contents by weight which is not "in addition to or different than" the federal net weight labeling requirements. Art. 5.1 shows that the interpretation of "net quantity" enforced in California is "different than" the federal standard:

> 2940.1 *Package Inspection.* (a) Each sealer of weights and measures shall, within his county, inspect packages of meat and meat products and poultry and poultry products to determine whether the label weight stated on the package is accurate at time of inspection.
>
> (b) The determination of accuracy shall be made by weighing all of the usable product within the container, exclusive of wrappers and packing substances.
>
> (c) As an alternative procedure to the procedure stated in subsection (b), the sealer of weights

by the district court was narrower in scope than the relief requested by Rath. Rath's notice of appeal specifically noted the limitation of relief. We also note that the district court, 357 F. Supp. at 533, relied on Becker, Jones, and Christensen's citation of §12211 as the primary statutory authority in fashioning the remedy. By changing their statutory basis of authority, they scarcely should argue that Rath has the burden of foreseeing what regulations they will use next.

> and measures shall establish an accurate tare weight for the containers within a lot of packages and weigh each of the inspected packages. He shall:
>
> (1) Remove 3 packages from the lot at random and weigh each of the unopened packages;
>
> (2) Remove from each of the 3 containers all of the usable product, exclusive of wrappers and packing substances; and
>
> (3) Determine the tare weight for each of the 3 packages separately by subtracting the weight of the usable product from the gross weight.
>
> He shall weigh separately each of the packages in the lot to be inspected and apply as a tare weight for purposes of the lot the lowest tare weight obtained by the above procedure.
>
> (d) For purposes of the procedure specified in subsection (c), a lot is defined as a group of packages assembled in one place, of the same product and brand, in apparently identical containers, bearing the same statement of weight.

It is clear beyond cavil that Art. 5.1 makes *no* allowance for variations from accurate weight *whatever*. Since the federal standard, by virtue of 9 CFR 317.2 (h)(2), requires recognition of reasonable variations due to gain or loss of moisture, etc., Art. 5.1 is preempted by the federal standard and may not be enforced. To the extent that §12607 is interpreted to permit a definition of "net quantity" which does not recognize the reasonable variations allowed by the

federal standard, it is likewise preempted and may not be enforced.[29] The applicability of Art. 5.1 only during the "proceedings" of this case does not deter us from considering its enforcement improper, since we have no control over the interpretation of its period of applicability either administratively or by a state court except by assuring by injunction that Art. 5.1 will not be enforced at all.

VI.
CONCLUSION

In recapitulation we hold:

(1) that the district court had jurisdiction over the subject matter of this case, personal jurisdiction being conceded;

(2) that the district court erred in invalidating 9 CFR 317.2(h)(2);

(3) that the Wholesome Meat Act of 1967, 21 USC, §601 et seq., and 9 CFR 317.2(h)(2) preempt Cal. Bus. and Prof. Code §12211 and 4 Cal. Admin. Code ch. 8, subch. 2, Art. 5,

[29]Section 12607 is not saved by Cal. Bus. and Prof. Code §12613, which provides:

> If any provision of this chapter is less stringent or requires information different from any requirement of Section 4 of the act of Congress entitle[d] "Fair Packaging and Labeling Act" (P.L. 89-755; 80 Stat. 1296, 15 U.S.C. 1451-1461) or of any regulation promulgated pursuant to such act, the provision shall be inoperative to the extent that it is less stringent or requires information different from any such federal requirement, in which event each such federal requirement is a part of this chapter.

No California standard, even if of equal or greater stringency than the federal standard, may be enforced if it is *different* from the federal standard. As enforced in Art. 5.1, §12607 is different from the Wholesome Meat Act standard, whether less stringent or not. The Fair Packaging and Labeling Act is, of course, not relevant to this case.

and that Becker, Jones, and Christensen were properly enjoined from enforcing those sections;

(4) that the district court correctly held that state standards not in addition to or different than the federal net weight labeling standard may be enforced by appropriate State procedures at the retail level; and

(5) that 4 Cal. Admin. Code ch. 8, subch. 2, Art. 5.1, is preempted by federal law, that Cal. Bus. and Prof. Code §12607 is preempted by federal law to the extent indicated in part V, supra, and that their enforcement should be enjoined.

Accordingly, the judgment of the district court is affirmed in part, reversed in part, and the case is remanded for entry of an amended order in conformance with this opinion.

[357 Fed. Supp. 529-36]

The Rath Packing Company, a corporation, Plaintiff and Counter-Defendant, v. M. H. Becker as Director of the County of Los Angeles Department of Weights and Measures, Defendant, C. B. Christensen as Director of Agriculture of the State of California, Intervenor.

The Rath Packing Company, a corporation, Plaintiff, v. The People of the State of California, Joseph W. Jones as Director of the County of Riverside Department of Weights and Measures, Defendants. Civ. A. Nos. 72-607-R, 72-608-R. United States District Court, C. D. California. April 3, 1973.

MEMORANDUM OPINION AND ORDER

REAL, District Judge.

These matters have been consolidated for decision after trial of Case No. 72-607-R, and hearing of cross-motions for summary judgment in case No. 72-608-R. The facts of both cases have much commonality with little or no dispute of the facts necessary to disposition of both cases.

Plaintiff, The Rath Packing Company, (hereafter Rath), is a meat processor subject to inspection pursuant to the terms of the federal Wholesome Meat Act of 1967, 21 U.S.C. § 601 et seq.

Defendants M. H. Becker (hereafter Becker) and Joseph W. Jones (hereafter Jones) are Directors of County Department of Weights and Measures of Los Angeles and Riverside Counties respectively. C. B. Christensen, as Director of Agriculture of the State of California has heretofore been granted leave to intervene in the Becker action and has participated in presenting the defense in that action.

The controversey arises out of the actions of Becker and Jones through their respective deputies of ordering off-sale meat products delivered by Rath to retail stores found to be short of the weight stated on the label. Determination of short-weight has been made in each case by the application of the provision of Title 4, California Administrative Code, Chapter 8, subchapter 2, Article 5.

Fundamental to resolution of the validity of Becker and Jones' actions is a determination of the reach of the federal Wholesome Meat Act of 1967, 21 U.S.C.

§ 601 et seq., *i.e.*, preemption by the federal government of the regulation of meat and meat products.

The federal Wholesome Meat Act of 1967 was enacted by Congress with the finding that:

> ". . . Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers." 21 U.S.C. § 602.

A reading of the statutory scheme together with the legislative history[1] demonstrates clearly, in the context of our concern here, that Congress intended to broaden federal regulation of meat and meat food products to cope with adulteration, unwholesomeness and misbranding for the welfare of consumers.

The essence of the controversy here is found in Congressional enactment of Title 21, United States Code, Section 601(n) which provides:

> "(n) The term 'misbranded' shall apply to any . . . meat or meat food product under one or more of the following circumstances:
>
> (5) if in a package or other container unless it bears a label showing . . . (B) an accurate statement of the quantity of the contents in terms of weight, measure or numerical count: Provided,

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[1]U.S. Code Congressional and Administrative News, 90th Congress, First Session, 1967, pages 2188-2213.

That under Clause (B) of this subparagraph (5), reasonable variations may be permitted, . . . by regulations prescribed by the Secretary."

Rath claims that it meets the criteria of 21 U.S.C. § 601(n)(5) when its products are considered under the application of regulations published by the Secretary of Agriculture in 9 C.F.R. § 316.1 et seq. and 21 U.S.C. § 607(b).

21 U.S.C. § 607 (b) provides in its pertinent part:

"(b) All . . . meat and meat food products inspected at any establishment under the authority of this subchapter . . . shall at the time they leave the establishment bear, in distinctly legible form, directly thereon or on their containers . . . the information required under paragraph (n) of section 601 of this title."

Rath argues that section 607(b) limits the inquiry of accurate weight to the time meat or meat food products leave a processor's plant under federal inspection. Rath here argues for too much. To complete the regulatory scheme and maintain continuing enforcement, Congress gave federal meat inspectors the power of seizure of adulterated or misbranded meat or meat food products at any level of distribution. 21 U.S.C. § 673 makes clear that the provisions of section 601(n)(1-12) can be applied to packages of meat or meat food products at the ultimate end of a meat processor's distribution system—the retail store.

The defendants so argue—but they fall short in the recognition of what it is they are permitted to do by the federal Wholesome Meat Act of 1967. The provisions of 21 U.S.C. § 679 limit the state

in clear and unequivocal language. Therein, the states are admonished that ". . . [M]arking, labeling, packaging or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State . . . with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter. . . ." Rath is clearly within these requirements.

Defendants defend their acts and rely—as the source of their authority and practice—upon state statutes. We now proceed to analyze that state statutory scheme to determine whether it meets the limitations of 21 U.S.C. § 678 when applied to the products of Rath.

Defendants cite as their primary source California Business and Professions Code section 12211 which provides in its pertinent part:

"§ 12211. Weighing or measuring commodities sold or being delivered; rules and regulations; off sale order; evidence. Each sealer shall . . . weigh or measure packages, containers or amounts of commodities sold, or in the process of delivery, in order to determine whether the same contain the quantity or amount represented. . . .

The director is hereby authorized and directed to adopt and promulgate necessary rules and regulations governing the procedures to be followed by sealers . . . in determining whether any package or container or a lot of such packages or containers complies with the provisions of this section.

* * * *

Whenever a lot or package of any commodity is found to contain . . . a less amount than

that represented, the sealer shall in writing order same off sale. . . ."

Following the direction of the California legislature, the Director of Agriculture of the State of California has published in Title 4, California Administrative Code, Chapter 8, subchapter 2, Article 5 (hereafter Article 5) a comprehensive procedure for testing commodities to determine their compliance with California Business and Professions Code section 12211. In a detailed step by step process, the sealer is led to the determination of whether or not the commodities in question "contain a lesser amount than represented". The procedure is a statistical determination based upon normal and proven statistical standards. As such, the result can be no better than the objective, and the stated objective of Article 5 is to determine by sampling techniques the qualification of a lot of commodities to the requirements of section 12211, *i.e.*, that the quantity represented on the label is what the package contains. These techniques are questioned by Rath as contravening the prohibition against adding to or differing from the labeling requirements of the federal Wholesome Meat Act of 1967. Defendants argue validity, urging that preemption by the federal government is limited by 21 U.S.C. § 678 when it provides:

> ". . ., but any State or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing distribution . . . of any such articles which are adulterated or misbranded and are outside of such an establishment. . . ."

It is clear in the provisions for concurrent jurisdiction outside an inspected plant that such actions as are undertaken by states in the regulation of meat and meat food products must be *consistent* with the requirements of the federal Wholesome Meat Act of 1967. That Act has spoken upon the subject of misbranding—and more particularly when misbranding is related to comparison of the label with contents as provided in 21 U.S.C. § 601(n)(5) in this language:

> "(n) The term 'misbranded' shall apply to any . . . meat or meat food product . . .
>
> * * *
>
> (5) if in a package or other container it bears a label showing . . . (B) an accurate statement of quantity . . . in terms of weight . . .: Provided, That under clause (B) of this subparagraph (5) reasonable variations may be permitted . . . by regulations prescribed by the Secretary."

To implement subsection (5), the United States Secretary of Agriculture published rules and regulations in Title 9, Code of Federal Regulations. In section 317.2(h)(2) the Secretary provides:

> "(2) The statement as it is shown on a label shall not be false or misleading and shall express an accurate statement of the quantity of contents of the container exclusive of wrappers and packing substances. Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large."

California Article 5 just does not meet this federal standard. Nowhere in the measuring processes set forth

therein in detail is any consideration given to the possible "loss . . . of moisture during the course of good distribution practice." The measure of Article 5 is "absolute" as determined by accepted statistical methods and, as such, erroneously encroaches upon the standards provided by the federal Wholesome Meat Act of 1967.

Defendants argue, however, that section 317.2(h)(2) is void for vagueness; that, therefore, we are left with the absolute standard, "an accurate statement of . . . weight". Though valid, this argument does not end the inquiry in favor of state action. California Article 5—though measuring the absolute provided in California Business and Professions Code section 12211—applies a statistical "averaging" concept for the sealer to make the final determination of whether or not packages in violation should be ordered "off-sale". The federal Wholesale Meat Act of 1967 does not give state legislatures or state officers—even in the grant of concurrent enforcement jurisdiction—the right to substitute their judgment of what variances, either plus or minus come within the absolute standard of "an accurate statement of . . . in terms of weight." 21 U.S.C. § 601(n)(5)(B). Plaintiff argues the validity of 9 C.F.R. § 317.2(h)(2), citing the Supreme Court sanction of a similar statute in United States v. Shreveport Grain & Elevator Company, 287 U.S. 77, 53 S.Ct. 42, 77 L.Ed. 175 (1932).

But *Shreveport, supra,* does not reach the regulation under consideration here. In *Shreveport, supra,* the primary standard was given vitality because the "rules and regulations . . . deal with the *entire subject in detail* under the recital, '(i) the following tolerances

and variations' . . . ." (Emphasis added.) The Court then goes on to say at page 84, 53 S.Ct. at page 44:

> ". . . Then follows an enumeration of discrepancies due to errors in weighing which occur in packing conducted in compliance with good commercial practice; . . . ."

What *Shreveport, supra,* is telling us is that the *statutory* delegation is viable. It does not give viability to a redelegation that is subject to different enforcement resulting in varying degrees of reasonableness. The statute [21 U.S.C. § 601(n)(5)] gives the Secretary the power of definition of "reasonable variations". The Secretary here has completely failed to accept the duty that can be expressed only in rules and regulations properly promulgated pursuant to federal law.[2] Section 317.2(h)(2) is void for its inadequacy to set any recognizable standard upon which any individual may measure his conduct or his compliance with the law by which he must order his personal or business life.[3]

Conceding the invalidity of section 317.2(h)(2) to defendants, they now argue that the state is free to set its own standards of "reasonable variations" citing Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248, rehearing denied, 374 U.S. 858, 83 S.Ct. 1861, 10 L.Ed.2d 1082. The error of such dependence on *Florida Lime, supra,* is evidenced by the recognition by the Supreme

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[2]5 U.S.C. §§ 551-559.

[3]Under the regulation as it is written one meat inspector may conclude that x% loss of moisture can be expected. Given the same factual context, another meat inspector may come to the conclusion that y% loss of moisture is reasonable. Delegation of "administrator's function" has never included giving each enforcement officer the "keys to the jailhouse".

Court, beginning at page 142, 83 S.Ct. 1210, that Congress had not foreclosed activity by the states where it can be reconciled with federal regulation. Here the defendants attempt to justify the California statutory scheme by a misunderstanding that labeling, qua labeling, is what the federal Wholesome Meat Act of 1967 is all about and that California's statute is aimed at misbranding. This conclusion is erroneous for two reasons:

1. Congress has defined "misbranding".
2. "Misbranding" has no meaning except insofar as it describes a departure from the labeling description of a commodity within a package.[4]

The Court is aware of the admonition in *Florida Lime, supra,* in measuring preemption when the Supreme Court says at page 142, 83 S.Ct. at page 1217:

> "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakenly so ordained."

The Congress here has left no doubt. It is *the* provisions of *the* federal Wholesome Meat Act of 1967 that are applicable to mislabeling or misbranding that must be applied. Neither state legislatures nor state officers can add or subtract from those definitions. If administrative definition of "reasonable variances" is desirable, it is the United States Secretary of Agricul-

[4]Each of the twelve categories of misbranding described in 21 U.S.C. § 601(n) refers to, in some way, a label. Common sense tells us that mislabeling and misbranding are synonymous terms.

ture who must speak. When he fails to speak or misspeaks his authority, the state cannot substitute its voice. Defendants here do not, in any sense of the word, pretend to be applying federal statutory standards. The enforcement of California Business and Professions section 12211 and its implementation in California Administrative Code Article 5 exceeds the concurrent enforcement rights of the state and its officers.

This conclusion should not in any way be taken to mean that state officers (sealers) cannot continue their stated mission to protect consumers of their respective jurisdictions. They have available to them a federal statutory scheme which, when properly executed by state or federal officers, secures to the American homemaker the assurance that expected wholesomeness and value is received for each consumer dollar spent. That the evidence here shows the United States Department of Agriculture may have abdicated some of its protective duty, does not justify the application of a *different* labeling requirement by the state of California and its officers.

The claimed exemptions by Rath of its meat and meat food products do not—if beyond the preemption standards recognized herein—need resolution to fully determine the controversy between the parties.

In case No. 72-607-R judgment shall be entered for plaintiff.

In case No. 72-608-R the motion for summary judgment of defendant is denied. The motion for summary judgment of plaintiff is granted.

Accordingly,

It is ordered:

1. That defendants and intervenor in case No. 72-607-R, and defendants in case No. 72-608-R, together with their respective deputies, inspectors, officers, agents, servants, employees, attorneys and other persons in active concert or participation with them, and each of them, are restrained and enjoined permanently from applying the provisions of California Business and Professions Code section 12211 and/or the provisions of Title 4, California Administrative Code, Chapter 8, subchapter 2, Article 5, to articles prepared and marketed by plaintiff under United States Department of Agriculture's inspection in accordance with the requirements of the federal Wholesome Meat Act of 1967 [21 U.S.C. § 601 et seq.].

2. The Court reserves the continuing jurisdiction to make any modification to this injunction upon proper application by any party, as the ends of justice may require.

APPENDIX B.

Constitutional and Statutory Provisions Involved

Constitution of the United States, Article VI, clause 2.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment X.

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Wholesome Meat Act, 81 Stat. 584, 21 United States Code § 601 et seq.

§ 601. Definitions.

As used in this chapter, except as otherwise specified, the following terms shall have the meanings stated below:

(a) The term "Secretary" means the Secretary of Agriculture of the United States or his delegate.

* * * *

(h) The term "commerce" means commerce between any State, any Territory, or the District of Columbia, and any place outside thereof; or within any Territory not organized with a legislative body, or the District of Columbia.

(n) The term "misbranded" shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:

(1) if its labeling is false or misleading in any particular;

* * * *

(4) if its container is so made, formed, or filled as to be misleading;

(5) if in a package or other container unless it bears a label showing (A) the name and place of business of the manufacturer, packer, or distributor; and (B) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided,* That under clause (B) of this subparagraph (5), reasonable variations may be permitted, and exemptions as to small packages may be established, by regulations prescribed by the Secretary;

* * * *

(o) The term "label" means a display of written, printed, or graphic matter upon the immediate container (not including package liners) of any article.

(p) The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

§ 602. Congressional statement of findings.

Meat and meat food products are an important source of the Nation's total supply of food. They are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce. It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated,

and properly marked, labeled, and packaged. Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers. The unwholesome, adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally. It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce, and that regulation by the Secretary and cooperation by the States and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers.

§607. Labeling, marking, and container requirements.

(a) Labeling receptacles or coverings of meat or meat food products inspected and passed; supervision by inspectors.

When any meat or meat food product prepared for commerce which has been inspected as herein-

before provided and marked "Inspected and passed" shall be placed or packed in any can, pot, tin, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this subchapter is maintained, the person, firm, or corporation preparing said product shall cause a label to be attached to said can, pot, tin, canvas, or other receptacle or covering, under the supervision of an inspector, which label shall state that the contents thereof have been "inspected and passed" under the provisions of this subchapter; and no inspection and examination of meat or meat food products deposited or inclosed in cans, tins, pots, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this subchapter is maintained shall be deemed to be complete until such meat or meat food products have been sealed or inclosed in said can, tin, pot, canvas, or other receptacle or covering under the supervision of an inspector.

(b) Information on articles or containers; legible form.

All carcasses, parts of carcasses, meat and meat food products inspected at any establishment under the authority of this subchapter and found to be not adulterated, shall at the time they leave the establishment bear, in distinctly legible form, directly thereon or on their containers, as the Secretary may require, the information required under paragraph (n) of section 601 of this title.

(c) Labeling: type styles and sizes; definitions and standards of identity or composition; standards of fill of container; consistency of Federal and Federal-State standards.

The Secretary, whenever he determines such action is necessary for the protection of the public, may prescribe: (1) the styles and sizes of type to be used with respect to material required to be incorporated in labeling to avoid false or misleading labeling in marketing and labeling any articles or animals subject to this subchapter or subchapter II of this chapter; (2) definitions and standards of identity or composition for articles subject to this subchapter and standards of fill of container for such articles not inconsistent with any such standards established under the Federal Food, Drug, and Cosmetic Act, and there shall be consultation between the Secretary and the Secretary of Health, Education, and Welfare prior to the issuance of such standards under either Act relating to articles subject to this chapter to avoid inconsistency in such standards and possible impairment of the coordinated effective administration of these Acts. There shall also be consultation between the Secretary and an appropriate advisory committee provided for in section 661 of this title, prior to the issuance of such standards under this chapter, to avoid, insofar as feasible, inconsistency between Federal and State standards.

(d) Sales under false or misleading name, other marking or labeling or in containers of misleading form or size; trade names, and other marking, labeling, and containers approved by Secretary.

No article subject to this subchapter shall be sold or offered for sale by any person, firm, or corporation, in commerce, under any name or other marking or labeling which is false or misleading, or in any container of a misleading

form or size, but established trade names and other marking and labeling and containers which are not false or misleading and which are approved by the Secretary are permitted.

(e) Use withholding directive respecting false or misleading marking, labeling, or container; modification of false or misleading matter; hearing; withholding use pending proceedings; finality of Secretary's action: judicial review: application of section 194 of Title 7.

If the Secretary has reason to believe that any marking or labeling or the size or form of any container in use or proposed for use with respect to any article subject to this subchapter is false or misleading in any particular, he may direct that such use be withheld unless the marking, labeling, or container is modified in such manner as he may prescribe so that it will not be false or misleading. If the person, firm, or corporation using or proposing to use the marking; labeling or container does not accept the determination of the Secretary, such person, firm, or corporation may request a hearing, but the use of the marking, labeling, or container shall, if the Secretary so directs, be withheld pending hearing and final determination by the Secretary. Any such determination by the Secretary shall be conclusive unless, within thirty days after receipt of notice of such final determination, the person, firm, or corporation adversely affected thereby appeals to the United States court of appeals for the circuit in which such person, firm, or corporation has its principal place of business or to the United States Court of Appeals for the District of Columbia Circuit. The provisions of section 194 of Title 7 shall be applicable to appeals taken under this section.

§624. Storage and handling regulations; violations; exemption of establishments subject to non-Federal jurisdiction.

The Secretary may by regulations prescribe conditions under which carcasses, parts of carcasses, meat, and meat food products of cattle, sheep, swine, goats, horses, mules, or other equines, capable of use as human food, shall be stored or otherwise handled by any person, firm, or corporation engaged in the business of buying, selling, freezing, storing, or transporting, in or for commerce, or importing, such articles, whenever the Secretary deems such action necessary to assure that such articles will not be adulterated or misbranded when delivered to the consumer. Violation of any such regulation is prohibited. However, such regulations shall not apply to the storage or handling of such articles at any retail store or other establishment in any State or organized Territory that would be subject to this section only because of purchases in commerce, if the storage and handling of such articles at such establishment is regulated under the laws of the State or Territory in which such establishment is located, in a manner which the Secretary, after consultation with the appropriate advisory committee provided for in section 661 of this title, determines is adequate to effectuate the purposes of this section.

§ 678. Non-Federal jurisdiction of Federally regulated matters; prohibition of additional or differ-

ent requirements for establishments with inspection services and as to marking, labeling, packaging, and ingredients; recordkeeping and related requirements; concurrent jurisdiction over distribution for human food purposes of adulterated or misbranded and imported articles; other matters.

Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory of the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but any State or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing this distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry

into the United States. This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

Code of Federal Regulations, Title 9, Section 317.2.

. . . .

(b) Any word, statement, or other information required by this part to appear on the label must be prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use. In order to meet this requirement, such information must appear on the principal display panel except as otherwise permitted in this part.

(c) Labels of all products shall show the following information on the principal display panel (except as otherwise permitted in this part), in accordance with the requirements of this part or, if applicable, Part 319 of this subchapter:

(4) An accurate statement of the net quantity of contents, as prescribed in paragraph (h) of this section:

(h)(1) The statement of net quantity of contents shall appears on the principal display panel of all containers to be sold at retail intact, in conspicuous and easily legible boldface print or type in distinct contrast to other matter on the package and shall be declared in accordance with

the provisions of subparagraphs (2) through (10) of this paragraph.

(2) The statement as it is shown on a label shall not be false or misleading and shall express an accurate statement of the quantity of contents of the container exclusive of wrappers and packing substances. Reasonable variations caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large.

California Business and Professions Code § 12211.

Each sealer shall, from time to time, weigh or measure packages, containers or amounts of commodities sold, or in the process of delivery, in order to determine whether the same contain the quantity or amount represented and whether they are being sold in accordance with law.

The director is hereby authorized and directed to adopt and promulgate necessary rules and regulations governing the procedures to be followed by sealers in connection with the weighing or measuring of amounts of commodities in individual packages or containers or lots of such packages or containers, including the procedures for sampling any such lot, and in determining whether any package or container or a lot of such packages or containers complies with the provisions of this section. Any such rule or regulation, or amendment thereof, shall be adopted and promulgated by the director in conformity with the provisions of Chapter 4.5 (commencing with Section 11371), of

Part 1 of Division 3 of Title 2 of the Government Code; provided, that the average weight or measure of the packages or containers in a lot of any such commodity sampled shall not be less, at the time of sale or offer for sale, than the net weight or measure stated upon the package, and provided further, that said rules or regulations applicable to food, as defined in Section 26450 of the Health and Safety Code, insofar as possible, shall not require higher standards and shall not be more restrictive than regulations, if any, promulgated by the Department of Health, Education, and Welfare, Food and Drug Administration, under the provisions of the Federal Food, Drug and Cosmetic Act.

Any lot or package of any such commodity which conforms to the provisions of this section shall be deemed to be in conformity with the provisions of this division relating to stated net weights or measures.

Whenever a lot or package of any commodity is found to contain, through the procedures authorized herein, a less amount than that represented, the sealer shall in writing order same off sale and require that an accurate statement of quantity be placed on each such package or container before same may be released for sale by the sealer in writing. The sealer may seize as evidence any package or container which is found to contain a less amount than that represented.

California Business and Professions Code § 17500

It is unlawful for any person, firm, corporation or association, or any employee thereof with

intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this State, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, any statement, concerning such real or personal property or services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any such person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell such personal property or services, professional or otherwise, so advertised at the price stated therein, or as so advertised.

California Civil Code §3369.

1. Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or unfair competition.

2. Any person performing or proposing to perform an act of unfair competition within this State may be enjoined in any court of competent jurisdiction.

3. As used in this section, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, untrue or misleading advertising and any act denounced by Business and Professions Code Sections 17500 to 17535, inclusive.

61 Stat. 166, 7 U.S.C. section 135(a) provides:[1]

(a) It shall be unlawful for any person to distribute, sell, or offer for sale in any Territory or in the District of Columbia, or to ship or deliver for shipment from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, or to receive in any State, Territory, or the District of Columbia from any other State, Territory or the District of Columbia, or foreign country, and having so received, deliver or offer to deliver in the original unbroken package to any other person, any of the following:

. . . .

(2) Any economic poison unless it is in the registrant's or the manufacturer's unbroken immediate container, and there is affixed to such container, and to the outside container or wrapper of the retail package, if there be one through which the required information on the immediate container cannot be clearly read, a label bearing—

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[1]This statute was amended to transfer responsibility for its enforcement to the Administrator, Environmental Protection Agency, by 84 Stat. 2086. No substantive change was made to 7 U.S.C. § 135(a)(2)(c).

(a) the name and address of the manufacturer, registrant, or person for who manufactured;

(b) the name, brand, or trade-mark under which said article is sold; and

(c) the net weight or measure of the content: *Provided,* That the Secretary may permit reasonable variations.

. . . .

The United States Department of Agriculture issued an interpretation of this statute which has been adopted as a regulation by the Environmental Protection Agency, 40 C.F.R. §162.104.

40 C.F.R. §162.104 provides:

Interpretation with respect to statement of net contents.

(a) *Requirement of the act.* The act requires that the label of each economic poison bear a statement of the net weight or measure of the contents.

(b) *Terms of weight or measure.* (1) If there are terms of weight or measure in general use for a particular economic poison which will give accurate information to users as to the quantity of content, such terms shall be used on the label.

. . . .

(d) *Permissible variations.* (1) If the contents are stated as a minimum quantity, the package must contain at least the quantity claimed. No variation below this quantity is permitted and any variation above the contents stated must not be unreasonably large.

(2) The net content is considered to be the average net content unless stated as a minimum quantity. Where average net content is used:

(i) The average content of the packages in any shipment must not fall below the quantity stated and variation above the quantity stated is permitted only to the extent that it represents deviations unavoidable in good packing practice.

(ii) There must be no unreasonable variation from the average in the content of any package.

(e) *Allowance for loss.* A statement of net content "when packed" does not comply with the requirements of the act. The statement must be such that it will be correct as long as the economic poison is subject to the law. Thus, if a product such as borax may lose weight by drying out when stored in paper bags, it must be packed and labeled in such a way that the statement of net content will be correct when the product is purchased.

. . . .

APPENDIX C.

Relevant Portions of the Record Below

Testimony of V. L. Hutchings, U.S.D.A. Regional Compliance Officer (Reporter's Transcript, pp. 371-394)

DIRECT EXAMINATION

BY MR. GOODMAN:

Q Mr. Hutchings, would you state your present occupation?

A I am the officer in charge for the compliance staff for the United States Department of Agriculture meat and poultry inspection programs.

Q For any particular region?

A Western region.

Q How long have you held that position?

A Going on two years.

Q When did you become compliance supervisor for the western region?

A March '71.

Q Prior to assuming those duties did you also have employment with the United States Department of Agriculture?

A Yes, sir. I had two years as a compliance officer with the same staff prior to that. And I had 14 years as meat and poultry inspector inside the official establishment.

Q Mr. Hutchings, as a compliance and review officer what were your duties?

A You are asking me as compliance officer now?

Q Yes, as an officer prior to assuming your present position.

A Okay. My job was to monitor the interstate transportation of meat and poultry products both edible

and inedible to determine whether they were misbranded or adulterated and take appropriate action if found to be in violation of federal codes.

Q Can you tell us how you determined whether a product which had moved in interstate commerce was misbranded?

MR. DUNLAVEY: Objection; immaterial as to how he determined it, your Honor.

THE COURT: The objection is sustained.

BY MR. GOODMAN:

Q Can you tell us what the enforcement procedure was that you followed to determine whether a product was misbranded?

MR. DUNLAVEY: The same objection; irrelevant, your Honor.

THE COURT: The objection is sustained.

MR. DUNLAVEY: We are concerned with state test procedures here.

THE COURT: Sustained.

BY MR. GOODMAN:

Q What are your duties in your present position?

A I am supervisor of *seven compliance officers* in the western area that perform the same duty as I stated prior.

Q How many states are there in the western region?

A *Twelve states* including Alaska and Hawaii.

Q Have you given those inspectors any instructions to follow with respect to making determinations of whether meat and poultry products are misbranded at the retail level?

MR. DUNLAVEY: Objection; irrelevant.

THE COURT: The objection is sustained.

(Brief pause.)

BY MR. GOODMAN:

Q As head of the retail compliance, United States Department of Agriculture, have you ever caused meat to be ordered off sale because it was short weight at retail?

MR. DUNLAVEY: Objection, your Honor, irrelevant.

THE COURT: The objection is overruled.

THE WITNESS: Ordered—

BY MR. GOODMAN:

Q You may answer.

A Let me get this—would you restate the question.

THE COURT: Read the question.

(Record read.)

THE WITNESS: Yes.

BY MR. GOODMAN:

Q Would you describe the circumstances?

MR. DUNLAVEY: Same objection.

THE COURT: The objection is sustained.

BY MR. GOODMAN:

Q Does your unit have a procedure by which it inspects meat food products at the retail level which have been subjected to in-plant inspection under the federal Wholesome Meat Act?

MR. DUNLAVEY: Objection, your Honor; USDA procedures are apparently being regarded as irrelevant at this trial unless they stem from a statute or reg so the question is irrelevant.

. . . .

THE COURT: The objection is overruled.

MR. GOODMAN: Would the reporter read the question.

THE WITNESS: Right.

(Record read.)

MR. DUNLAVEY: I object to that question, your Honor, as irrelevant unless the witness first testifies that that procedure is found in the statutes or regulations.

THE COURT: That objection is overruled.

THE WITNESS: Yes, we do have a procedure. It is set up adminis—

MR. DUNLAVEY: Your Honor, I assume the next question is going to be, "What is the procedure," and the same objection would be made to it. So before the witness goes ahead may I request that we go question by question.

THE COURT: The objection is overruled. There is nothing pending.

BY MR. GOODMAN:

Q What is that procedure, Mr. Hutchings?

A Okay. The procedure is an administrative procedure based on the regulations promulgated under 9 CFR, Section 301 through and inclusive of 325.

MR. DUNLAVEY: May I take the witness on voir dire before this goes any further?

THE COURT: All right.

VOIR DIRE EXAMINATION

BY MR. DUNLAVEY:

Q Mr. Hutchings, you said the administrative procedure that you are about to describe is based on the regulations. Is that procedure stated in the regulations as such?

A Could you clarify for me the procedure now? Are you asking me if the exact procedure is set forth or if the regulations are there prescribing the handling of this product or the inspection of this product?

Q My question is whether the procedure that you are going to describe is set out in the regulations as distinguished from just being based on them.

A They are not set forth in the regulations.

MR. DUNLAVEY: I object to any further continuation of the answer as irrelevant.

THE COURT: The objection is overruled. It is admitted only for the limited purpose of explaining the question set forth in the regulations, that is, what are the tolerances for good manufacturing process and good distribution process, if it will shed any light upon that subject.

. . . .

A The procedure is set forth on the basis of the regulations as we explained with the understanding that there is on a complaint basis to go into retail stores, *we do not normally make a review in the retail stores.* In other words, we don't go in every day randomly selecting stores and review these, it is on a complaint basis. The review is based on—with the court's indulgence let me think a minute. (Brief pause.)

Okay. The review is based on the inspector's knowledge and the regulations that prescribe that all meat and poultry products are wholesome and not misbranded. This that would be based—would be based from a consumer or various other sources. The compliance officer would be charged with the responsibility of making inquiry, determining the facts of that complaint and producing that information.

If a violation, or it appears to be a violation, in an alleged situation that would be fully documented, all procedures would be fully documented and it would be documented for our legal counsel.

MR. DUNLAVEY: I move to strike the answer because from the limited purpose of what your Honor admitted it has no bearing.

THE COURT: Sustained.

BY MR. GOODMAN:

Q What procedures do you rely on in making your determinations, Mr. Hutchings?

Perhaps we can clear it up this way. What are the sources that you might rely on in making a determination of short weight at retail?

MR. DUNLAVEY: Objection, irrelevant.

THE COURT: The objection is overruled.

THE WITNESS: You specifically referred to short weight?

BY MR. GOODMAN:

Q Yes, that is what this case is about.

A *Short weights would be complaint by another government agency,* would be by a consumer, would be by a retailer. They would specify that they have reason to believe is improperly weighed. On that basis *we would ask somebody in authority, an agency in authority to check that product and produce that information to us, the findings of whether that product was in fact in violation or not.*

Q *What other governmental agencies would you rely on to receive this information?*

A We have many of them, Federal Food and Drug, State Food and Drug, Weights and Measures people.

Q *Would that be state's Weights and Measures?*

A *State's Weights and Measures are, yes.*

Q What kind of information do you receive from state Weights and Measures people to assist you in making your determination?

MR. DUNLAVEY: Objection as irrelevant, your Honor.

THE COURT: The objection is sustained.

(Brief pause.)

BY MR. GOODMAN:

Q How do you make your determination of whether a product is misbranded at the retail level?

MR. DUNLAVEY: Objected to, your Honor, unless the question is limited to short weight.

THE COURT: The objection is sustained.

Limit it to that.

. . . .

A The agency, whichever agency was doing the work for us, state or federal, would be asked to produce actual evidence of their findings that the product was actually—the net weight was improper or different than that stated on the package. And that procedure would be presented, a thorough procedure, as basis for the calculations or for picking up—holding the product.

Q What is it that you consider to be an improper net weight at retail?

MR. DUNLAVEY: Objection, your Honor; what he considers is irrelevant.

THE COURT: The objection is overruled limited to the consideration the court has indicated.

THE WITNESS: Would you state the question.

THE COURT: Read the question.

(Record read.)

THE WITNESS: Are you asking specific weights or percentages or what more specific?

BY MR. GOODMAN:

Q Whatever is the procedure which you use as a compliance officer for the western region.

A If the information that was obtained from the agency that did the weighing indicated that the product was underweight, and *this would be a judgment call on my part* basically with this information, we'd be talking about more than one package being underweight within that one or two packages. If it got beyond five or six out of say ten or fifteen packages this is reason to believe that there is enough product underweight that we would take action against.

Q Would the determination of shortage from the stated label weight be made by the other governmental organization; Would they do the testing?

A The other government—

MR. DUNLAVEY: Objection as irrelevant and ambiguous.

THE COURT: The objection is overruled.

THE WITNESS: The Government agency which was doing the testing would advise us of that difference in weight.

BY MR. GOODMAN:

Q *County Departments of Weights and Measures would be such governmental organizations?*

A *Yes,* could be.

Q *Is it a correct statement that you would rely upon the determination as to short weight made by a California County Department of Weights and Measures in making your determination of short weight?*

A *Yes, we would use that method and their information.*

. . . .

Q *Have you instructed your compliance officers to visit retail markets when California County Weights*

and Measures officials are making determinations of weight at retail?

A *No,* sir.

. . . .

CROSS-EXAMINATION

BY MR. DUNLAVEY:

Q You have testified about a procedure that is used in checking net weight at the retail store level. *Is that procedure reduced to writing anywhere?*

A *No,* sir.

Q Where did it come from?

A *First off we are not qualified as persons to check net weights,* our compliance officers. But other agencies do have that qualification and we have to ask for those agencies to assist us in making these determinations or we have to rely on their information to remove or to have product removed from the market that may be misbranded.

Q Who authorized that kind of procedure?

(Brief pause.)

A Well, just to tell you the truth, I really don't know. It is in our administrative handling of our problems within compliance staff.

Q It does not exist anywhere in writing? It is just some practice that has been followed as a matter of habit, is that right?

A Habit—

. . . .

THE WITNESS: Yes.

BY MR. DUNLAVEY:

Q Are you aware at least to some extent of the content of the Wholesome Meat Act of 1967?

A Yes, sir.

Q Are you aware of Section 601(n) which defines the term "misbranded"?

A Yes, sir.

Q And are you aware of that part of that section that says that there shall be an accurate statement of the quantity of contents on the label with respect to weight measure or numerical count?

. . . .

Q Upon what statute or regulation do you base your procedure that the statement of net weight shall be accurate at the time you find the product in the retail store?

. . . .

THE COURT: . . .

Where do you find that?

THE WITNESS: You have stated part of that 601 (n) which states that this must be properly labeled or contents must be stated. And also the meat inspection regulations which provide the same criteria only it is only—it is further explained.

BY MR. DUNLAVEY:

Q That really does not answer the question I had asked you. Upon what statute or regulation do you base your requirement that the statement about net weight shall be accurate at the time the product is in the retail store?

A I do not believe we have a statement on retail stores or regulation on the retail stores' net weight.

. . . .

Q The Department of Agriculture regulations provide among many other things—

THE COURT: Do not read the provisions of the regulations, Mr. Dunlavey. I am going to have to read them to decide this case. And the fact that this man knows or does not know that they exist does not change that requirement by me.

MR. DUNLAVEY: Your Honor, if you can appreciate my position here as counsel. This man was allowed to testify because your Honor was interested whether he could shed any light upon what the department provides or recognizes as reasonable variation for manufacturing practices.

THE COURT: That is right. He has told me the practice.

MR. DUNLAVEY: Pardon?

THE COURT: He has told me the practice.

MR. DUNLAVEY: I would like to explore—

THE COURT: That is all I was interested in was the practice so I could find out whether or not it helped shed any light on this distribution practice.

MR. DUNLAVEY: I need to explore that, your Honor, for my client's protection to find out—

THE COURT: Then ask the question directly.

Is there anything in the regulations that explains what good distribution practice is. That is going to be a big problem in this case, I think.

BY MR. DUNLAVEY:

Q Let me repeat my question, Mr. Hutchings.

Is there—

THE WITNESS: Would you kindly restate—

THE COURT: *Is there anything in the Code of Federal Regulations that explains what good distribution practice means?*

THE WITNESS: *No, sir, not to my knowledge.*

BY MR. DUNLAVEY:

Q Is there anything in the regulations that puts a quantitative limit on a reasonable variation?

A Not to my knowledge.

Q Is there anything in the regulation that puts a limit on the amount of reasonable variation that is to be recognized for loss of moisture that is caused by good distribution practice?

. . . .

Q Is there anything in the statute or in the regulations that tells you how much weight a product may lose during the course of distribution practice because of the loss of moisture?

A Not to my knowledge, no.

Q Is there anything in the regulations that puts a quantitative measure on whether a variation from stated quantities of contents is unreasonably large?

A Not to my knowledge, no.

(Pause.)

Q You said that whether a given amount of deviation from stated net weight at the retail store amounts to an improper deviation is something that is within your "judgment call," what did you mean by that?

A Not having the specific facts I would have to say this: That if an agency produced information that the majority of the product we were talking about was not properly labeled, or in this case the net weights were less than what was stated on the package, it would be my judgment that that product should be removed from it or detained under our authority and the owner of that product notified and asked to correct the deviation.

Q Is there anything within the Department of Agriculture that authorizes you to accept a representa-

tion by a California Weights and Measures official as to whether a product is or is not short weight?

A There is nothing that authorizes this, that is right.

Q Then you do this as a matter of your personal determination and not as a matter of Department of Agriculture policy?

A No. I think this is department-wide, or at least our staff-wide. I don't do it personally, no, sir.

. . . .

Q Is there anything that the department has told you or given to you which you regard as an instruction to use this state determination as your determination?

A There is no written material on those lines, that is right.

. . . .

Q Have you ever exercised the judgment as to whether some meat product had lost moisture during distribution then was reasonable as a variation from stated net weight?

. . . .

A Yes, we have.

Q Did you base that judgment on any federal statute or regulation?

A Would you ask the question that was asked before this that I answered yes to?

THE COURT: Read the question.

(Record read.)

(Brief pause.)

THE WITNESS: No, we did not.

BY MR. DUNLAVEY:

Q You are changing your answer?

A No. The second question you asked was if we use—if I recall the question right, we used a procedure

within USDA or regulations that stated this, is that right?

Q Your testimony is that you exercised such judgment but the judgment was not based on a federal statute or regulation?

A That is right.

Q Do you recall what that judgment was when you exercised it?

A Sir?

Q Do you recall what the judgment was when you exercised it? In short, what did your judgment designate as reasonable variation at the time you exercised it?

A The information was produced by—can we relate to specific states, sir?

THE COURT: Well—

THE WITNESS: The Government agency—another Government agency produced evidence to us that there was product in question due to moisture loss or other loss, not solely water, and that the net weight statement on the package was different from that that the product was weighed. We used the section that you quoted to start with, Section 601. That product was misbranded at that time with that information that that state agency produced for us.

BY MR. DUNLAVEY:

Q How short was it?

A Those records I would have to obtain. I cannot tell you exactly.

Q Do you recall approximately the percentage that the weight was short from what the label said?

. . . .

THE WITNESS: Can I give you the approximation in ounces rather than percentages?

THE COURT: Certainly.

THE WITNESS: If I recall the figures correctly they were between a quarter of an ounce and a half an ounce less than the stated net weight.

BY MR. DUNLAVEY:

Q And the stated net weight was how much?

A One pound, sir.

Q Have you ever given advice to any meat packer as to how much variation you or your group would regard as reasonable as a variation from stated net weight?

A Absolutely not.

Q Why not?

A That is not in my realm. I have no authority to tell the packer or advise the packer or any producer what he is allowed to do. And especially in regard to net weights which are administered by another division of our agency and other agencies.

Q So if a packer were to ask you how much variations was reasonable variation you would decline to state?

A That is right. I am not qualified.

MR. DUNLAVEY: No other questions.

. . . .

Testimony of Norman L. Mettert, Los Angeles County Department of Weights and Measures (Reporter's Transcript, pp. 335-339)

DIRECT EXAMINATION

BY MR. GRAHAM:

Q Do you have a deputy sealer's certificate?

A Yes.

Q Issued by the State of California?

A Yes.

Q Are you the supervisor in the Compliance Division under whom the bacon inspections were made between the period of time September 1971 to March '72?

A Yes.

Q Mr. Mettert, as a result of those inspections which resulted in off sale orders were package inspection reports made?

A Yes, they were.

MR. GRAHAM: At this time I would like to submit these documents for identification.

THE COURT: Defendants' A marked for identification.

(The exhibits referred to were marked Defendants' Exhibit A for identification.)

. . . .

THE COURT: All right. A-1 through A-4.

(The exhibits referred to were marked Defendants' Exhibits A-1 to A-4 for identification.)

BY MR. GRAHAM:

Q Mr. Mettert, are those package inspection reports?

A Yes, they are.

Q What dates do those cover?

(Brief pause.)

A From October 15, 1971 through March 9, 1972.

. . . .

Q Mr. Mettert, did you make a summary of the conclusions in those package inspection reports covering those dates before you?

A I did.

Q Did you prepare a summary sheet?

A I did.

MR. GRAHAM: I would like to have marked for identification summary sheets prepared by Mr. Mettert. This is designated on the pretrial order as our Exhibit E.

THE COURT: We will mark those as B.

MR. GRAHAM: Fine.

THE COURT: B for identification.

(The exhibit referred to was marked Defendants' Exhibit B for identification.)

(Brief pause.)

BY MR. GRAHAM:

Q Mr. Mettert can you tell us what your summary sheets mean with reference to these off sale orders or the package inspection reports?

A Each entry designates a lot that was inspected showing the average error either plus or minus of each lot and those lots in which they were ordered off sale.

Q How do you distinguish on your summary sheets the differences between the plus errors and the minus errors?

A The plus errors are recorded in black pen. The minus errors are recorded in red pen. Those lots in which they were ordered off sale were circled.

Q Mr. Mettert, covering the same period of time did your inspectors inspect the bacon products of Farmer John and Oscar Mayer?

A They did.

Q At any time during this period did you find that any of their lots were ordered off sale because they were short weight?

MR. DUNLAVEY: Objection, your Honor; irrelevant and it is not before the court.

THE COURT: The objection is sustained.

MR. GRAHAM: Your Honor, I would like to make an offer of proof that Mr. Mettert prepared summary sheets involving conclusions which his department found relating to Oscar Mayer and Farmer John. His conclusions being that at no time was any package ordered off sale for being short weight. Contrary to that these brands were substantially overpacked to take care of presumably any deviation which might occur.

THE COURT: What's that got to do with this lawsuit?

MR. GRAHAM: It has to do, your Honor, with conditions in the industry which you were referring to yesterday I believe.

THE COURT: Conditions in the industry? That has nothing to do with conditions in the industry. That has absolutely nothing to do with conditions in the industry.

MR. GRAHAM: It has to do with how other packers pack their bacon.

THE COURT: That does not show how other packers pack their bacon at all. It doesn't show it at all. It shows a result of something but it doesn't show how they do it.

MR. GRAHAM: I think it would appear that these statistics demonstrate that they do overpack. The package inspection reports would reflect they overpack.

THE COURT: We do not know that, Mr. Graham. They may have some secret that Rath does not have. We don't know that. This result doesn't show anything. It has no relevancy to this lawsuit.

. . . .

Testimony of Chester A. Jaensen, Rath Packing Company
(Reporter's Transcript, pp. 122-127)

. . . .

BY MR. GOODMAN:

Q Is it a correct statement that Rath cures its bacon in part by injecting pork bellies with a curing solution?

A Yes, it is.

Q Can you tell us what is used in that curing solution?

A Yes.

Q Would you do so, please?

A The curing solution consists of water, salt, sodium nitrate, sodium marithorbate and tripolyphosphate.

Q And what is the purpose of the tripolyphosphate?

A It supposedly imbibes water.

Q Is that a technical way of saying that it causes moisture retention in the belly?

A Yes.

Q It does cause moisture retention?

A Yes.

Q Do you recall the amount of this curing solution that was injected into the bellies being produced in the Rath Vernon plan between—

MR. DUNLAVEY: May I object—excuse me.

BY MR. GOODMAN:

Q Between June of 1971 and June of 1972?

MR. DUNLAVEY: Your Honor, I object to the question as constituting an attempt to probe the way in which the USDA has conducted its in-plant inspection. As I think your Honor has intended to convey, the question is whether the preparation of bacon is carried out under USDA inspection. It is not a question of how the USDA conducts that inspection.

THE COURT: That is correct, Mr. Goodman. I do not think we are here concerned with whether the United States Department of Agriculture does a good or bad job and whether the law is a good or bad law. It is just a question of the limitation that law has placed on the state.

MR. GOODMAN: Your Honor, in an earlier ruling it was our position that the manual was admissible only to show that Rath was not complying with it. And this question and another series are directed to show that Rath exceeds the standards of that manual whether or not it is of any validity.

THE COURT: We are not concerned about whether or not they exceeded, that is the Department of Agriculture, the United States Department of Agriculture's problem. If they don't do their job I guess there are ways of getting about it but it is not this lawsuit. I am not concerned here, I am concerned as a citizen that they do their job but I am not concerned here as a judge in this lawsuit as to whether or not they are doing a job properly or not.

What I am limited to here I think is what limitation that the law Congress has enacted places upon states, what the limitation is. I don't think it goes beyond that.

MR. GOODMAN: If I understand the court's ruling then testimony as to the amount of water in bacon is not proper before the court.

THE COURT: No. Whether Rath puts more water in their bacon than somebody else or somebody else puts more water in their bacon than Rath does is immaterial. The question is what does the law preclude the State of California and its subdivisions from doing in terms

of meat inspection, inspection of meat products and their packages.

MR. GOODMAN: Your Honor—

THE COURT: That is the question here. There is no other question here.

Whether or not what the USDA is doing is good or bad is not in issue.

MR. GOODMAN: My questions go to what Rath is doing. What I am trying to establish—

THE COURT: Even what they do, whether it is good or bad, is not an issue here. What is in issue is what limitations the Congress has put upon the state.

MR. GRAHAM: Your Honor, could I address myself to that issue?

THE COURT: Yes.

MR. GRAHAM: It seems to me that it is at issue because you can take the percentage of pumped amount of moisture in a belly and in a piece of bacon, and if it relates to the amount of shrink that bacon is going to have at the time of packaging, before packaging or after packaging, it seems to me that it is relevant to this case.

THE COURT: No, it isn't because that has to do with what job the United States Department of Agriculture is doing. On the state of the evidence thus far they ain't doing a very good job.

MR. GOODMAN: Your Honor, I would like to direct the court's attention to 9 CFR, Section 317.2(h)(2). Mr. Dunlavey cited that in his opening argument.

THE COURT: His opening statement is not evidence. I am not so sure that it even eliminates the issues.

. . . .

MR. GOODMAN: Your Honor, my reason for referencing that regulation is that it provides in part for reasonable variations caused by unavoidable deviations of good manufacturing practices. And the question—

THE COURT: The question then or the issue is what is good manufacturing practice and what is good distribution practice, and what variances are to be expected as a result of that.

After you gentlemen all got through I was going to ask Mr. Jaensen as to what manufacturing process was placed to the bacon after it was sliced. Whether he knew anything about distribution practices and whether there were any criteria in the industry as to how much weight you are going to lose as a result of your distribution practice, that is what is relevant.

(Brief pause.)

THE COURT: Maybe there are procedures of the state to determine that. I don't know. I haven't heard them yet.

MR. GOODMAN: Your Honor, in any case I would like to make the following offer of proof.

That offer is as follows:

Between August 1971 and June 30, 1972, the Rath Packing Company injected 16 percent moisture into the bacon prior to its being pumped. That the bacon weighed between 12 and 13 percent drain weight for a 9 to 14½ pound belly range.

That the Rath records show that the smokehouse shrink was between 7 and 9 percent. That the cooler shrink was between 1½ and 2½ percent. And that the anticipated weight of the bellies after completion of all processes prior to slicing shows that the bacon

would contain at least 3½ percent added moisture. This is under the process for the 9 to 14½ pound bellies.

THE COURT: All right.

MR. GOODMAN: In addition, your Honor, that for the week ending 9/18/71 for bellies in cure Rath used 18,644 pounds of bellies. But that record of the Rath Packing Company labeled "Material Yield Profit or Loss" for that week end showing actual pounds produced from those same amount of raw product to be 22,548 pounds or an additional 3,904 pounds of bacon.

That for the week ending 12/4/1971 the actual pounds used were 116,299 pounds but after smoke and immediately prior to slice the product showed 119,615 pounds or a net gain of 3,300 pounds.

That for the week ending 1/29/72 that the number of pounds of raw product actually used in the bacon product for the Rath Vernon plant, to which all of these records relate, were 190,361 pounds. That the actual amount of bacon produced was 195,816 pounds for a net gain of 12,898 pounds of bacon containing water.

. . . .

APPENDIX D.

Title 4, California Administrative Code, ch. 8, subch. 2, Art. 5, Provides:

DEFINITIONS

2930. The definitions in this Article apply to this Article only and do not affect the provisions of any other Article, Chapter or Sub-Chapter.

2931. "Container" means any receptacle or carton, whether lidded or unlidded, into which a commodity is packed or placed, or any wrappings with or into which any commodity is wrapped or put for sale.

2931.1. "Package" means any consumer size "container" and its contents.

2931.2. "Tare Material" shall be synonymous with "Container," and "Tare" and shall be construed to be the weight of such tare material.

2931.3. "Lot" means the total number of packages of a single item of merchandise in a single size at one location and may contain two or more "sub-lots."

"One location" shall be construed to mean "one display" or "one grouping," and does not, for example, mean all items of the same brand and size stored or kept for sale in one establishment.

(a) "Sub-lot" refers to those packages of merchandise within either a "Standard-Pack" lot or "Random-Pack" lot which can be readily identified by a similar or uniform "Lot-Symbol" or grouping.

2931.4. "Lot-Symbol" means the word, letter or numeral (or combination of these), used by the packer or manufacturer to identify packages which were packed or shipped at a given time.

2931.5. CLASSES OF PREPACKAGED COMMODITIES. (a) "Standard-Pack" means consumer size packages of a uniform weight, measure or count, of the same brand or identification.

(b) "Random-Pack" means consumer size packages of the same brand or identification but of varying weight, volume, or count.

2931.6. "Sample" designates the group of packages or containers used for testing purposes. (a) "Package Sample Size" shall be as noted in "Procedure," 2933.3, Table I, Column "B" and shall be based on Column "A" "Lot Size."

(b) "Sub-groups" shall be formed by recording the individual observations in the order in which they are weighed, measured, or counted.

(c) "Tare Sample Size" shall be as noted in "Procedure," 2933.3, Table I, Column "D" and shall be based on Column "B" "Package Sample Size."

(Note: When selecting a sample representing a "lot" or "sub-lot", the packages shall be selected at random if practicable. Packages shall be selected without regard to appearance. If practicable all samples shall be selected before any weighing, measuring or testing is done. This provides for testing the "lot" or "sub-lot" in an "as found" condition.)

2931.7. "Retail Level" shall be construed to designate any place of business, or manner of selling any product, in which said product is, or may be, sold, offered or exposed for sale directly to the consumer or user.

(Note: When selecting a "sample" to be tested at the "retail level" said sample shall include only those packages selected from a "lot" or "sub-lot" at a single point-of-sale location. This shall not preclude the taking of other "samples" from storage facilities, or other locations, within the retail outlet. However, any action to be taken by the inspector with respect to any "lot" or "sub-lot" shall be based on the "sample" of the specific "lot" or "sub-lot.")

2931.8. "Wholesale Level" shall be construed to include the packing, manufacturing, warehouse, storage, jobber and distribution levels.

(Note: In most cases at the above named levels, products will be found in case lots. The "sample" shall be based on the number of "packages" within the cases of the "lot" or "sub-lot.")

2931.9. "Unsuitable-for-sale" packages are packages that have been opened for testing purposes and cannot, in their opened state, be classed as saleable merchandise.

However, packages opened in the place of business where originally packaged are not to be construed as "unsuitable-for-sale" if, by following good sanitary procedures and adequately protecting the public health, the commodity within these packages may be reprocessed or repackaged. This shall be done at the expense of said packer.

2931.10. "Error" means the amount the observed net contents of a package varies from the declared labeled contents.

EQUIPMENT AND USE

2932. The testing equipment used by weights and measures officials shall be of such design, sensitivity, and construction so as to render accurate weight indications throughout its designated capacity. Said testing equipment should be fitted with locking devices to minimize wear to the working component while in transit, and should also be fitted with a handle for carrying and a protective cover or box.

All testing equipment owned by a weights and measures jurisdiction shall be restricted to official use and completely controlled by said weights and measures jurisdiction.

Scales used by State or local officials for the package-checking procedure should be of such design and construction as to afford weight graduations appropriate to the quantity declarations on the packages to be checked.

2932.1. After the announcement of his presence, the official is to select a suitable position for his package-checking operations. The principal requirement of the site is its convenience - both to the inspector and to the place of business.

2932.2. The inspector shall see that the testing equipment used is placed upon a firm support immediately prior to its official use, is suitably leveled, and is tested for sensitiveness and accuracy at least through the weight range of the package to be tested.

2932.2.1. If a store scale is selected for use in the tests it shall be accurate and capable of being properly utilized for such tests. Once the scale has been selected by the inspector, it shall not be released, except at his discretion, until the inspector's use of it has been completed. (Amended 9-23-71)

2932.3. Package "errors" (the amount of deviation from the stated net contents) shall be recorded only within the sensitivity of the scale at the applied load.

(Example: A scale graduated in 1/8 oz. graduations is found to be accurate and sensitive to 1/16 oz. Errors may be recorded to 1/16 oz. or any amount greater than 1/16 oz. A scale graduated in 1/8 oz. graduations is found to be accurate and sensitive to 1/8 oz. In no case shall errors be recorded to less than 1/8 oz. for that scale, but may be recorded in amounts greater than 1/8 oz.)

PROCEDURE: COMMODITIES SOLD BY WEIGHT OR COUNT IN "STANDARD-PACK" OR "RANDOM-PACK" PACKAGES:

2933. It is the intent of the following step-by-step procedures to outline a uniform, feasible, and equitable method for determining acceptable or "off-sale" lots of packaged commodities based upon the average concept, and for determining which packages have unreasonable errors.

2933.1. LOTS. The procedures for package testing as set forth herein shall be used only for single "lots," or "sub-lots." The results obtained from full samples of different "lots" or "sub-lots" shall not be numerically averaged together or acted upon jointly. For purposes of passing or marking "off-sale," each lot or sub-lot tested shall be acted upon individually.

2933.2. OFF-SALE ORDER. Pursuant to Division 5, Chapter 1, Section 12025.5 of the Business and Professions Code of the State of California, packages marked "off-sale" shall be suitably marked or identified with a tag or device. Said device or tag to be designed and furnished by the Bureau. Such packages shall be subject to the provisions of Section 12025.5.

2933.3. PAYMENT FOR PACKAGES. Immediately after completion of tests upon a "lot" to be passed as correct the weights and measures official in charge of the test shall offer to pay for packages which he has, or caused to be, rendered "unsuitable for sale." Any such packages paid for with county funds shall be subject to such disposal as ordered by the governing Board of Supervisors. If, however, the "unsuitable for sale" packages are part of a lot marked off-sale then these packages are to be considered as part of the lot and the weights and measures officials need

not pay for said packages. Packages opened in the place of business where originally packaged are not to be construed as "unsuitable-for-sale" if, by following good sanitary procedures and adequately protecting the public health, the commodity within these packages may be reprocessed or repackaged. This shall be done at the expense of the said packer. Pursuant to Division 5, Chapter 2, Article 2, Section 12211 of the Business and Professions Code, "the sealer may seize as evidence any package or container which is found to contain a lesser amount than represented."

Table I shall be used for Step 1 through Step 5 following:

TABLE I

"A" LOT SIZE	"B" PACKAGE SAMPLE SIZE	"C" SUB-GROUP SIZE	"D" TARE SAMPLE SIZE
2	2	ALL	2
3	3	ALL	2
4	4	ALL	2
5	5	ALL	2
6	6	ALL	2
7	7	ALL	2
8	8	ALL	2
9	9	ALL	2
10	10	ALL	2
11-150	10	5	2
151-300	15	5	2
301-500	25	5	3
501-800	30	5	4
801-1300	40	5	5
1301-3200	50	5	6
3201-8000	60	5	7
8001-22,000	120	5	12
Over 22,000	240	5	23

2933.3.1. (Step.) Determine the number of consumer size packages in the "lot" to be tested.

2933.3.2. (Step 2.) Determine the "PACKAGE SAMPLE SIZE" from Table I, Section 2933.3, Column "B" "PACKAGE SAMPLE SIZE" corresponding to Column "A" "LOT SIZE."

2933.3.3. (Step 3.) Determine the "TARE SAMPLE SIZE" from Table I, Section 2933.3, Column "D" "TARE SAMPLE SIZE" corresponding to Column "B" "PACKAGE SAMPLE SIZE."

(Example: The "lot" being sampled consists of 32 cases of 24 consumer size packages in each case. "LOT SIZE" (Column "A") = 768 consumer size packages (32 x 24 = 768). A lot size of 768 packages falls in the range of 501-800 in Column "A", and by reading to the right in Column "B" a "PACKAGE SAMPLE SIZE" of 30 is determined. By reading to the right of 30 in Column "B", a "TARE SAMPLE SIZE" of 4 is determined from Column "D". These four packages are to be selected at random from the packages selected to represent the "PACKAGE SAMPLE SIZE.")

2933.3.4. (Step 4.) RECORDING OF TARE SAMPLE. Carefully weigh and record the gross weight of each package of the "Tare Sample" and identify each with a letter or numeral to be written on the package. (These containers should then be retained for use in Step 5). Exercising care that none of the contents is spilled or lost, determine and record the net weight of the contents of each package. The net weight of the contents shall not include any free water or ice or ice glaze. When products are packed in non-edible brine or other non-edible preserving fluids, the weight or measure of the non-edible brine or other non-edible fluid shall not be included in the weight or measure of the edible or other commodity indicated on the container.

2933.3.5. (Step 5.) TARE WEIGHT DETERMINATION. Determine the average tare weight of the containers in the "Tare Sample" by dividing the total weight of the tare material by the number of containers. Individual container tare weights are classified as "Wet Tare" and "Dry Tare." When a single lot has some containers classed as "Wet Tares" and others as "Dry Tares", the weights of a representative number of "Wet Tares" and "Dry Tares" may be combined and averaged together.

(a) "Wet Tare" shall be determined by weighing the used, empty container from which all the usable net contents have been removed.

(b) "Dry Tare" shall be determined by weighing the empty and dry containers or by weighing unused containers of the same make, design, and type used at the time of packing. A "Dry Tare" is to be used only when none of the containers in the lot being sampled has retained a substance foreign to the container. (Amended 9-23-71)

2933.3.6. (Step 6.) RECORDING OF ERRORS. Using the average tare weight determined in Step 5, each package in the PACKAGE SAMPLE shall be weighed and the errors recorded and, except for one hundred per cent sampling, shall be recorded in sub-groups of five (5). Regardless of the units in which the errors are recorded, (Tenths, sixteenths, eighths, quarters, or the like), these recordings are shown as whole numbers. The recording of results, either by one hundred per cent sampling or sub-groups, shall be as follows:

(a) The "zero errors" (recorded as 0) and the "plus errors" (recorded as whole numbers) are to be recorded in one column.

(b) The "minus errors" (recorded as whole numbers) are to be recorded in a second column.

2933.3.7. (Step 7.) ESTABLISHED TOLERANCE. If a tolerance has been established by the Director for the commodity being tested, then any package the error of which exceeds, either plus or minus, the established tolerance shall be subject to appropriate action.

2933.3.8. (Step 8.) PRELIMINARY TOTAL ERROR. Determine the preliminary total error of the PACKAGE SAMPLE. The preliminary total error, for those lots on which conclusions have not been reached under the foregoing procedure, shall be determined as illustrated by the following example:

(Note: In Example I below, the lot consisted of 200 packages, giving "PACKAGE SAMPLE SIZE" of 15 and a "SUB-GROUP SIZE", from Table I, of 5, therefore three SUB-GROUPS shall be used in the computation.)

(a) As in the Example I below, add the plus (+) errors, on the one hand, and the minus (-) errors, on the other hand.

EXAMPLE I

	ERRORS		RANGE
	-	+ & 0	
SUB-GROUP #1	1		
	3		
	1		
	1		
	3		2
SUB-GROUP #2	2	1	
	8	2	
		1	10
SUB-GROUP #3	2	0	
		0	
		0	
		0	2
Totals -	-21	+4	14

Preliminary Total Error (-21) + (4) = -17

Preliminary Average Error (-17 ÷ 15) = -1.13

Preliminary Average Range (14 ÷ 3) = 4.66

(b) Calculate the preliminary total error by algebraically adding the plus and minus errors. This is accomplished by arithmetically subtracting the smaller from the larger value and giving the remainder the sign of the larger value. (For example a plus four, (+4) added to a minus two, (-2), equals a plus two, (+2); or a plus four, (+4), added to a minus nine, (-9), equals a minus five, (-5.)

2933.3.9. (Step 9.) RANGE. Calculate the range of each sub-group. The range is the total difference between the largest and smallest observation. (For example, the range between a minus 8 (-8) and a plus 2 (+2) is 10, or the range between a plus 2 (+2) and a plus 10 (+10) is 8.) Total the ranges of all the sub-groups in the sample. Divide this sum by the number of sub-groups in the sample. Record this result as the preliminary average range. (In Example 1, Section 2933.3.8, we have 14 ÷ 3 = 4.66.)

2933.3.10. (Step 10.) UNREASONABLE ERRORS. Determine the unreasonable error of individual packages by one of the following:

(a) If the preliminary average error is plus or zero, an individual unreasonable plus error is that package error which exceeds the sum of the preliminary average error and the numerical value shown in Table II; and an individual unreasonable minus error is one which exceeds the numerical value shown in Table II.

(b) If the preliminary average error is minus, an individual unreasonable minus error is that package error which exceeds the numerical value shown in Table II; and an individual unreasonable plus error is that package error which exceeds the value of the remainder of the preliminary average error subtracted from the numerical value shown in Table II.

(Note: In Example, using the range of 4.66 and the sub-group size of 5, the individual unreasonable minus error from Table II is any minus package error greater than 3.90; and the individual unreasonable plus error is any plus package error greater than 1.13 subtracted from 3.90 or 2.77.)

(c) Circle and exclude all individual unreasonable errors from further computations. Additional replacement packages shall be selected until those discarded as individual unreasonable errors have been replaced by ones suitable for final computation. Only packages having errors equal to or less than the unreasonable individual errors as originally determined in (a) and (b) of this section shall be suitable for final computations.

(d) If at any time during this part of the procedure the total number of packages having unreasonable minus errors, which are also unreasonable under the provisions of Division 5, Chapter 6, Section 12613 and 12614 of the Business and Professions Code, and this number exceeds the number shown in Table I, Column D, for the corresponding sample size, then appropriate action shall be taken according to the provisions of Division 5, Chapter 2, Article 2, Section 12211 of the Business and Professions Code without further sampling.

If at any time during this part of the procedure the total number of packages having unreasonable plus errors exceeds the number shown in Table I, Column D, for the corresponding sample size then appropriate action shall be taken by calling this condition to the attention of the store operator or packer, or distributor.

SUMMARY OF RECORDING PROCEDURE

1. Record individual errors in columns of five.
2. Determine individual ranges.
3. Calculate average range.
4. Table II.
5. Circle minus errors greater than Table II.
6. Reject lot if number of unreasonable minus errors exceed tare sample size.
7. Determine total error (TE).
8. Determine average error.
9. Add or subtract average error to Table II.
10. Circle plus values greater than Table II plus or minus average error.
11. Replace unreasonable plus and minus values.
12. Calculate new ranges, average range and total error.
13. Consult Tables III and V
14. Accept, reject or take second sample after applying correction factors as may be required.

TABLE 1

"A" LOT SIZE	"B" PACKAGE SAMPLE SIZE	"C" SUB-GROUP SIZE	"D" TARE SAMPLE SIZE
2	2	All	2
3	3	All	2
4	4	All	2
5	5	All	2
6	6	All	2
7	7	All	2
8	8	All	2
9	9	All	2
10	10	All	2
11-150	10	5	2
151-300	15	5	2
301-500	25	5	3
501-800	30	5	4
801-1300	40	5	5
1301-3200	50	5	6
3201-8000	60	5	7
8001-22,000	120	5	12
Over 22,000	240	5	23

TABLE II
MAXIMUM PERMISSIBLE INDIVIDUAL ERROR

Range*	SUB-GROUP SIZE 2	3	4	5	6	7	8	9	10
0.01-0.19	.17	.12	.10	.08	.08	.07	.07	.07	.06
0.20-0.39	.52	.35	.29	.25	.23	.22	.21	.20	.19
0.40-0.59	.87	.58	.48	.42	.39	.36	.34	.33	.32
0.60-0.79	1.22	.81	.67	.59	.54	.51	.48	.46	.45
0.80-0.99	1.56	1.04	.86	.76	.70	.65	.62	.59	.57
1.00-1.24	1.95	1.30	1.07	.95	.87	.82	.77	.74	.72
1.25-1.49	2.39	1.59	1.31	1.16	1.06	1.00	.95	.91	.88
1.50-1.74	2.82	1.88	1.55	1.37	1.26	1.18	1.12	1.07	1.03
1.75-1.99	3.26	2.17	1.78	1.58	1.45	1.36	1.29	1.24	1.19
2.00-2.24	3.69	2.46	2.02	1.79	1.64	1.54	1.46	1.40	1.35
2.25-2.49	4.13	2.75	2.26	2.00	1.84	1.72	1.63	1.57	1.51
2.50-2.74	4.56	3.04	2.50	2.21	2.03	1.90	1.81	1.73	1.67
2.75-2.99	4.99	3.33	2.74	2.42	2.22	2.08	1.98	1.90	1.83
3.00-3.24	5.43	3.62	2.97	2.63	2.42	2.27	2.15	2.06	1.99
3.25-3.49	5.86	3.91	3.21	2.84	2.61	2.45	2.32	2.23	2.15
3.50-3.74	6.30	4.20	3.45	3.05	2.80	2.63	2.50	2.39	2.31
3.75-3.99	6.73	4.49	3.69	3.27	3.00	2.81	2.67	2.56	2.47
4.00-4.24	7.16	4.78	3.93	3.48	3.19	2.99	2.84	2.72	2.63
4.25-4.49	7.60	5.07	4.16	3.69	3.38	3.17	3.01	2.89	2.79
4.50-4.74	8.03	5.36	4.40	3.90	3.58	3.35	3.18	3.05	2.95
4.75-4.99	8.47	5.65	4.64	4.11	3.77	3.53	3.36	3.22	3.10
5.00-5.24	8.90	5.93	4.88	4.32	3.96	3.71	3.53	3.38	3.26
5.25-5.49	9.34	6.22	5.12	4.53	4.16	3.90	3.70	3.55	3.42
5.50-5.74	9.77	6.51	5.35	4.74	4.35	4.08	3.87	3.71	3.58
5.75-5.99	10.20	6.80	5.59	4.95	4.54	4.26	4.04	[illegible]	3.74
6.00-6.49	10.86	7.24	5.95	5.27	4.83	4.53	4.30	4.[illegible]	3.98
6.50-6.99	11.72	7.82	6.43	5.69	5.22	4.89	4.65	4.45	4.30
7.00-7.49	12.59	8.40	6.90	6.11	5.61	5.25	4.99	4.78	4.62
7.50-7.99	13.46	8.97	7.38	6.53	5.99	5.62	5.33	5.11	4.94
8.00-8.49	14.33	9.55	7.85	6.95	6.38	5.98	5.68	5.44	5.25
8.50-8.99	15.20	10.13	8.33	7.37	6.77	6.34	6.02	5.77	5.57
9.00-9.49	16.07	10.71	8.81	7.79	7.15	6.70	6.37	6.10	5.89
9.50-10.49	17.37	11.58	9.52	8.43	7.73	7.25	6.88	6.60	6.37
10.50-11.49	19.11	12.74	10.47	9.27	8.51	7.97	7.57	7.26	7.00
11.50-12.49	20.84	13.90	11.42	10.11	9.28	8.70	8.26	7.92	7.64
13	22.58	15.05	12.38	10.95	10.05	9.42	8.95	8.58	8.28
14	24.32	16.21	13.33	11.80	10.83	10.15	9.64	9.24	8.92
15	26.05	17.37	14.28	12.64	11.60	10.87	10.33	9.90	9.55
16	27.79	18.53	15.23	13.48	12.37	11.60	11.01	10.56	10.19
17	29.53	19.69	16.18	14.32	13.15	12.32	11.70	11.22	10.83
18	31.27	20.84	17.14	15.17	13.92	13.05	12.39	11.88	11.46
19	33.00	22.00	18.09	16.01	14.69	13.77	13.08	12.54	12.10
20	34.74	23.16	19.04	16.85	15.47	14.50	13.77	13.20	12.74
21	36.48	24.32	19.99	17.69	16.24	15.22	14.46	13.86	13.37
22	38.21	25.48	20.94	18.54	17.02	15.95	15.14	14.52	14.01
23	39.95	26.63	21.90	19.38	17.79	16.67	15.83	15.18	14.65
24	41.69	27.79	22.85	20.22	18.56	17.40	16.52	15.84	15.28
25	43.42	28.95	23.80	21.06	19.34	18.12	17.21	16.50	15.92
26	45.16	30.11	24.75	21.91	20.11	18.85	17.90	17.16	16.56
27	46.90	31.27	25.70	22.75	20.88	19.57	18.59	17.82	17.19
28	48.63	32.42	26.66	23.59	21.66	20.29	19.27	18.48	17.83

TABLE II

MAXIMUM PERMISSIBLE INDIVIDUAL ERROR

Range*	2	3	4	5	6	7	8	9	10
29	50.37	33.58	27.61	24.44	22.43	21.02	19.96	19.14	18.47
30	52.11	34.74	28.56	25.28	23.20	21.74	20.65	19.80	19.10
31	53.85	35.90	29.51	26.12	23.98	22.47	21.34	20.46	19.74
32	55.58	37.06	30.46	26.96	24.75	23.19	22.03	21.12	20.38
33	57.32	38.21	31.42	27.81	25.52	23.92	22.72	21.78	21.01
34	59.06	39.37	32.37	28.65	26.30	24.64	23.40	22.44	21.65
35	60.79	40.53	33.32	29.49	27.07	25.37	24.09	23.10	22.29
36	62.53	41.69	34.27	30.33	27.84	26.09	24.78	23.76	22.92
37	64.27	42.85	35.22	31.18	28.62	26.82	25.47	24.42	23.56
38	66.00	44.00	36.17	32.02	29.39	27.54	26.16	25.08	24.20
39	67.74	45.16	37.13	32.86	30.16	28.27	26.85	25.74	24.84
40	69.48	46.32	38.08	33.70	30.94	28.99	27.53	26.40	25.47
41	71.21	47.48	39.03	34.55	31.71	29.72	28.22	27.06	26.11
42	72.95	48.63	39.98	35.39	32.48	30.44	28.91	27.72	26.75
43	74.69	49.79	40.93	36.23	33.26	31.17	29.60	28.38	27.38
44	76.43	50.95	41.89	37.07	34.03	31.89	30.29	29.04	28.02
45	78.16	52.11	42.84	37.92	34.80	32.62	30.98	29.70	28.66
46	79.90	53.27	43.79	38.76	35.58	33.34	31.66	30.36	29.29
47	81.64	54.42	44.74	39.60	36.35	34.07	32.35	31.02	29.93
48	83.37	55.58	45.69	40.44	37.12	34.79	33.04	31.68	30.57
49	85.11	56.74	46.65	41.29	37.90	35.52	33.73	32.34	31.20
50	86.85	57.90	47.60	42.13	38.67	36.24	34.42	33.00	31.84

*Range for coded values in tenth, one-sixteenth ounce, one-eighth ounce, or other values.

2933.3.11. (Step 11.) TOTAL ERROR. Recalculate a new total error and a new average error by the procedure outlined in Step 8 and Step 9. (See Example II).

(Note: In Example II, the minus 8 error is circled and discarded. The replacement package has a minus 3 error).

EXAMPLE II

	ERRORS -	ERRORS + & 0	RANGE
Sub-Group #1	1		
	3		
	1		
	1		
	3		2
Sub-Group #2	2	1	
	3 (8)	2	
		1	19 5
	2	0	
Sub-Group #3		0	
		0	
		0	2
Totals	22	+4	14
Corrected Totals	-16	+4	9

Corrected Total Error= (-16) + (4) = -12

Corrected Average Range (9 ÷ 3) = 3.00

The individual unreasonable errors, both plus and minus, are excluded from the average, because they are acted upon individually and because their inclusion could destroy or alter the packaging pattern. For instance: A sample of ten (10) packages could show nine (9) packages each with a minus error of 1, and one package with a plus error 9. If the large plus error is included, the total error is 0. Obviously, the pattern of the sample is a minus 1 per package.

2933.3.12. (Step 12.) PRELIMINARY DETERMINATION. (a) If the total error as obtained from the sample is plus and is less than the value shown in Table III for the corresponding range and sample size, then a shortage may or may not exist, and additional samples may or may not be taken, depending upon the discretion of the Weights and Measures Official. If no additional samples are taken the lot shall be passed. If additional samples are taken then the procedures as set forth in the following sections shall govern the disposition of the lot.

(b) If the total error obtained from the sample is less than the above-determined value, and the error is minus, then a shortage may or may not exist, and additional samples may or may not be taken, depending upon the discretion of the Weights and Measures Official. If no additional samples are taken the lot shall be passed. If additional samples are taken then the procedures as set forth in the following sections shall govern the disposition of the lot.

TABLE III
Value to be used to indicate a possible shortage**

Range*	SAMPLE SIZE 10	15	25	30	40	50	60	120	240
0.01-0.19	.22	.27	.35	.39	.45	.50	.55	.77	1.10
0.20-0.39	.67	.82	1.06	1.16	1.34	1.50	1.64	2.32	3.29
0.40-0.59	1.12	1.37	1.77	1.94	2.24	2.50	2.74	3.87	5.48
0.60-0.79	1.57	1.92	2.48	2.71	3.13	3.50	3.83	5.42	7.67
0.80-0.99	2.01	2.47	3.18	3.49	4.03	4.50	4.93	6.97	9.86
1.00-1.24	2.52	3.08	3.98	4.36	5.03	5.63	6.16	8.72	12.33
1.25-1.49	3.07	3.77	4.86	5.33	6.15	6.88	7.53	10.65	15.06
1.50-1.74	3.63	4.45	5.75	6.29	7.27	8.13	8.90	12.59	17.80
1.75-1.99	4.19	5.14	6.63	7.26	8.39	9.38	10.27	14.53	20.54
2.00-2.24	4.75	5.82	7.51	8.23	9.50	10.63	11.64	16.46	23.28
2.25-2.49	5.31	6.50	8.40	9.20	10.62	11.88	13.01	18.40	26.02
2.50-2.74	5.87	7.19	9.28	10.17	11.74	13.13	14.38	20.34	28.76
2.75-2.99	6.43	7.87	10.17	11.14	12.86	14.38	15.75	22.27	31.50
3.00-3.24	6.99	8.56	11.05	12.10	13.98	15.63	17.12	24.21	34.24
3.25-3.49	7.55	9.24	11.93	13.07	15.10	16.88	18.49	26.15	36.98
3.50-3.74	8.11	9.93	12.82	14.04	16.21	18.13	19.86	28.08	39.71
3.75-3.99	8.67	10.61	13.70	15.01	17.33	19.38	21.23	30.02	42.45
4.00-4.24	9.22	11.30	14.59	15.98	18.45	20.63	22.60	31.96	45.19
4.25-4.49	9.78	11.98	15.47	16.95	19.57	21.88	23.97	33.89	47.93
4.50-4.74	10.34	12.67	16.35	17.91	20.69	23.13	25.33	35.83	50.67
4.75-4.99	10.90	13.35	17.24	18.88	21.80	24.38	26.70	37.77	53.41
5.00-5.24	11.46	14.04	18.12	19.85	22.92	25.63	28.07	39.70	56.15
5.25-5.49	12.02	14.72	19.01	20.82	24.04	26.88	29.44	41.64	58.89
5.50-5.74	12.58	15.41	19.89	21.79	25.16	28.13	30.81	43.58	61.63
5.75-5.99	13.14	16.09	20.77	22.76	26.28	29.38	32.18	45.51	64.36
6.00-6.49	13.98	17.12	22.10	24.21	27.95	31.25	34.24	48.42	68.47
6.50-6.99	15.10	18.49	23.87	26.15	30.19	33.75	36.98	52.29	73.95
7.00-7.49	16.21	19.86	25.64	28.08	32.43	36.25	39.71	56.16	79.43
7.50-7.99	17.33	21.23	27.40	30.02	34.66	38.75	42.45	60.04	84.91
8.00-8.49	18.45	22.60	29.17	31.96	36.90	41.25	45.19	63.91	90.38
8.50-8.99	19.57	23.97	30.94	33.89	39.14	43.75	47.93	67.78	95.86
9.00-9.49	20.69	25.33	32.71	35.83	41.37	46.26	50.67	71.66	101.34
9.50-10.49	22.36	27.39	35.36	38.73	44.73	50.01	54.78	77.47	109.56
10.50-11.49	24.60	30.13	38.90	42.61	49.20	55.01	60.26	85.22	120.51
11.50-12.49	26.84	32.87	42.43	46.48	53.67	60.01	65.73	92.96	131.47
13	29.07	35.61	45.97	50.35	58.14	65.01	71.21	100.71	142.42
14	31.31	38.34	49.50	54.23	62.62	70.01	76.69	108.46	153.38
15	33.54	41.08	53.04	58.10	67.09	75.01	82.17	116.20	164.34
16	35.78	43.82	56.57	61.97	71.56	80.01	87.65	123.95	175.29
17	38.02	46.56	60.11	65.85	76.03	85.01	93.12	131.70	186.25
18	40.25	49.30	63.65	69.72	80.51	90.01	98.60	139.44	197.20
19	42.49	52.04	67.18	73.59	84.98	95.01	104.08	147.19	208.16
20	44.73	54.78	70.72	77.47	89.45	100.01	109.56	154.94	219.11
21	46.96	57.52	74.25	81.34	93.93	105.01	115.03	162.68	230.07
22	49.20	60.26	77.79	85.22	98.40	110.01	120.51	170.43	241.02
23	51.44	63.00	81.33	89.09	102.87	115.01	125.99	178.18	251.98
24	53.67	65.73	84.86	92.96	107.34	120.01	131.47	185.92	262.94
25	55.91	68.47	88.40	96.84	111.82	125.01	136.95	193.67	273.89
26	58.14	71.21	91.93	100.71	116.29	130.01	142.42	201.42	284.85
27	60.38	73.95	95.47	104.58	120.76	135.02	147.90	209.16	295.80
28	62.62	76.69	99.01	108.46	125.23	140.02	153.38	216.91	306.76
29	64.85	69.43	102.54	112.33	129.71	145.02	158.86	224.66	317.71

TABLE III
Value to be used to indicate a possible shortage**

Range*	SAMPLE SIZE 10	15	25	30	40	50	60	120	240
30	67.09	82.17	106.08	116.20	134.18	150.02	164.34	232.40	328.67
31	69.33	84.91	109.61	120.08	138.65	155.02	169.81	240.15	339.63
32	71.56	87.65	113.15	123.95	143.12	160.02	175.29	247.90	350.58
33	73.80	90.38	116.69	127.82	147.60	165.02	180.77	255.65	361.54
34	76.03	93.12	120.22	131.70	152.07	170.02	186.25	263.39	372.49
35	78.27	95.86	123.76	135.57	156.54	175.02	191.72	271.14	383.45
36	80.51	98.60	127.29	139.44	161.01	180.02	197.20	278.89	394.40
37	82.74	101.34	130.83	143.32	165.49	185.02	202.68	286.63	405.36
38	84.98	104.08	134.37	147.19	169.96	190.02	208.16	294.38	416.32
39	87.22	106.82	137.90	151.06	174.43	195.02	213.64	302.13	427.27
40	89.45	109.56	141.44	154.94	178.91	200.02	219.11	309.87	438.23
41	91.69	112.30	144.97	158.81	183.38	205.02	224.59	317.62	449.18
42	93.93	115.03	148.51	162.68	187.85	210.02	230.07	325.37	460.14
43	96.16	117.77	152.04	166.56	192.32	215.02	235.55	333.11	471.09
44	98.40	120.51	155.58	170.43	196.80	220.02	241.02	340.86	482.05
45	100.63	123.25	159.12	174.30	201.27	225.03	246.50	348.61	493.01
46	102.87	125.99	162.65	178.18	205.74	230.03	251.98	356.35	503.96
47	105.11	128.73	166.19	182.05	210.21	235.03	257.46	364.10	514.92
48	107.34	131.47	169.72	185.92	214.69	240.03	262.94	371.85	525.87
49	109.58	134.21	173.26	189.80	219.16	245.03	268.41	379.59	536.83
50	111.82	136.95	176.80	193.67	223.63	250.03	273.89	387.34	547.78

*Range for coded values in tenths, one-sixteenth ounce, one-eighth ounce, or other values.
**Based on sub-sample sizes of 5.

TABLE IV

Correction Factors

Percent of Lot Sampled	Correction Factor	Percent of Lot Sampled	Correction Factor	Percent of Lot Sampled	Correction Factor
1%	.99	34	.81	68	.57
2	.99	35	.81	69	.56
3	.98	36	.80	70	.55
4	.98	37	.79	71	.54
5	.97	38	.79	72	.53
6	.97	39	.78	73	.52
7	.96	40	.77	74	.51
8	.96	41	.77	75	.50
9	.95	42	.76	76	.49
10	.95	43	.75	77	.48
11	.94	44	.75	78	.47
12	.94	45	.74	79	.46
13	.93	46	.73	80	.45
14	.93	47	.73	81	.44
15	.92	48	.72	82	.42
16	.92	49	.71	83	.41
17	.91	50	.71	84	.40
18	.91	51	.70	85	.39
19	.90	52	.69	86	.37
20	.89	53	.69	87	.36
21	.89	54	.68	88	.35
22	.88	55	.67	89	.33
23	.88	56	.66	90	.32
24	.87	57	.66	91	.30
25	.87	58	.65	92	.28
26	.86	59	.64	93	.26
27	.85	60	.63	94	.24
28	.85	61	.62	95	.22
29	.84	62	.62	96	.20
30	.84	63	.61	97	.17
31	.83	64	.60	98	.14
32	.82	65	.59	99	.10
33	.82	66	.58	100	0
		67	.57		

TABLE V

Maximum Permissible Total Error**

Range*	SAMPLE SIZE 10	15	25	30	40	50	60	120	240
0.01-0.19	.42	.52	.67	.73	.84	.94	1.03	1.46	2.06
0.20-0.39	1.26	1.55	2.00	2.19	2.53	2.83	3.10	4.38	6.19
0.40-0.59	2.11	2.58	3.33	3.65	4.21	4.71	5.16	7.30	10.32
0.60-0.79	2.95	3.61	4.66	5.11	5.90	6.60	7.23	10.22	14.45
0.80-0.99	3.79	4.65	6.00	6.57	7.59	8.48	9.29	13.14	18.58
1.00-1.24	4.74	5.81	7.50	8.21	9.48	10.60	11.61	16.42	23.23
1.25-1.49	5.79	7.10	9.16	10.04	11.59	12.96	14.19	20.07	28.39
1.50-1.74	6.85	8.39	10.83	11.86	13.70	15.31	16.77	23.72	33.55
1.75-1.99	7.90	9.68	12.49	13.69	15.80	17.67	19.36	27.37	38.71
2.00-2.24	8.96	10.97	14.16	15.51	17.91	20.03	21.94	31.02	43.87
2.25-2.49	10.01	12.26	15.83	17.34	20.02	22.38	24.52	34.67	49.03
2.50-2.74	11.06	13.55	17.49	19.16	22.13	24.74	27.10	38.32	54.20
2.75-2.99	12.12	14.84	19.16	20.99	24.23	27.09	29.68	41.97	59.36
3.00-3.24	13.17	16.13	20.82	22.81	26.34	29.45	32.26	45.62	64.52
3.25-3.49	14.22	17.42	22.49	24.64	28.45	31.80	34.84	49.27	69.68
3.50-3.74	15.28	18.71	24.16	26.46	30.55	34.16	37.42	52.92	74.84
3.75-3.99	16.33	20.00	25.82	28.29	32.66	36.52	40.00	56.57	80.00
4.00-4.24	17.38	21.29	27.49	30.11	34.77	38.87	42.58	60.22	85.16
4.25-4.49	18.44	22.58	29.15	31.94	36.88	41.23	45.16	63.87	90.33
4.50-4.74	19.49	23.87	30.82	33.76	38.98	43.58	47.74	67.52	95.49
4.75-4.99	20.54	25.16	32.48	35.58	41.09	45.94	50.32	71.17	100.65
5.00-5.24	21.60	26.45	34.15	37.41	43.20	48.30	52.91	74.82	105.81
5.25-5.49	22.65	27.74	35.82	39.23	45.30	50.65	55.49	78.47	110.97
5.50-5.74	23.71	29.03	37.48	41.06	47.41	53.01	58.07	82.12	116.13
5.75-5.99	24.76	30.32	39.15	42.88	49.52	55.36	60.65	85.77	121.29
6.00-6.49	26.34	32.26	41.65	45.62	52.68	58.90	64.52	91.24	129.04
6.50-6.99	28.45	34.84	44.98	49.27	56.99	63.61	69.68	98.54	139.36
7.00-7.49	30.55	37.42	48.31	52.92	61.11	68.32	74.84	105.84	149.68
7.50-7.99	32.66	40.00	51.64	56.57	65.32	73.03	80.00	113.14	160.01
8.00-8.49	34.77	42.58	54.97	60.22	69.54	77.74	85.16	120.44	170.33
8.50-8.99	36.88	45.16	58.31	63.87	73.75	82.46	90.33	127.74	180.65
9.00-9.49	38.98	47.74	61.64	67.52	77.97	87.17	95.49	135.04	190.97
9.50-10.49	42.14	51.61	66.63	72.99	84.29	94.24	103.23	145.99	206.46
10.50-11.49	46.36	56.78	73.30	80.29	92.72	103.66	113.55	160.59	227.11
11.50-12.49	50.57	61.94	79.96	87.59	101.14	113.08	123.88	175.19	247.75
13	54.79	67.10	86.62	94.89	109.57	122.51	134.20	189.79	268.40
14	59.00	72.26	93.29	102.19	118.00	131.93	144.52	204.38	289.04
15	63.22	77.42	99.95	109.49	126.43	141.35	154.84	218.98	309.69
16	67.43	82.58	106.62	116.79	134.86	150.78	165.17	233.58	330.34
17	71.64	87.75	113.28	124.09	143.29	160.20	175.49	248.18	350.98
18	75.86	92.91	119.94	131.39	151.72	169.62	185.81	262.78	371.63
19	80.07	98.07	126.61	138.69	160.14	179.05	196.14	277.38	392.27
20	84.29	103.23	133.27	145.99	168.57	188.47	206.46	291.98	412.92
21	88.50	108.39	139.93	153.29	177.00	197.89	216.78	306.58	433.56
22	92.72	113.55	146.60	160.59	185.43	207.32	227.11	321.18	454.21
23	96.93	118.71	153.26	167.89	193.86	216.74	237.43	335.77	474.86
24	101.14	123.88	159.92	175.19	202.29	226.16	247.75	350.37	495.50
25	105.36	129.04	166.59	182.49	210.72	235.59	258.07	364.97	516.15
26	109.57	134.20	173.25	189.79	219.15	245.01	268.40	379.57	536.79
27	113.79	139.36	179.91	197.08	227.57	254.44	278.72	394.17	557.44
28	118.00	144.52	186.58	204.38	236.00	263.86	289.04	408.77	578.09
29	122.22	149.68	193.24	211.68	244.43	273.28	299.37	423.37	598.73

TABLE V
Maximum Permissible Total Error**

Range*	SAMPLE SIZE 10	15	25	30	40	50	60	120	240
30	126.43	154.34	199.90	218.98	252.86	282.71	309.69	437.97	619.38
31	130.64	160.01	206.57	226.28	261.29	292.13	320.01	452.57	640.02
32	134.86	165.17	213.23	233.58	269.72	301.55	330.34	467.16	660.67
33	139.07	170.33	219.89	240.88	278.15	310.98	340.66	481.76	681.32
34	143.29	175.49	226.56	248.18	286.57	320.40	350.98	496.36	701.96
35	147.50	180.65	233.22	255.48	295.00	329.82	361.30	510.96	722.61
36	151.72	185.81	239.88	262.78	303.43	339.25	371.63	525.56	743.25
37	155.93	190.97	246.55	270.08	311.86	348.67	381.95	540.16	763.90
38	160.14	196.13	253.21	277.38	320.29	358.09	392.27	554.76	784.55
39	164.36	201.30	259.87	284.68	328.72	367.52	402.60	569.36	805.19
40	168.57	206.46	266.54	291.98	337.15	376.94	412.92	583.96	825.84
41	172.79	211.62	273.20	299.28	345.58	386.37	423.24	598.55	846.48
42	177.00	216.78	279.86	306.58	354.00	395.79	433.56	613.15	867.13
43	181.00	221.94	286.53	313.88	362.43	405.21	443.89	627.75	887.78
44	185.43	227.11	293.19	321.18	370.86	414.64	454.21	642.35	908.42
45	189.65	232.27	299.86	328.47	379.29	424.06	464.53	656.95	929.07
46	193.86	237.43	306.52	335.77	387.72	433.48	474.86	671.55	949.71
47	198.07	242.59	313.18	343.07	396.15	442.91	485.18	686.15	970.36
48	202.29	247.75	319.85	350.37	404.58	452.33	495.50	700.75	991.01
49	206.50	252.91	326.51	357.67	413.00	461.75	505.83	715.35	1011.65
50	210.72	258.07	333.17	364.97	421.43	471.18	516.15	729.94	1032.30

*Range for coded values in tenths, one-sixteenth ounce, one-eighth ounce, or other values.
**Based on sub-sample sizes of 5.

If the total minus error as obtained from the sample is greater than the value determined from Table III after applying correction factor and is less than the value shown in Table V it shall be presumed that a shortage exists in the lot, and additional samples shall be taken before taking official action. When additional samples are taken these shall be included with the original sample, excluding any packages having unreasonable individual errors, and the combination shall be treated as a single sample, and the procedure as set forth in Sections 2933.3.8 to 2933.3.11 shall be followed.

FINAL DETERMINATION

If, however, the total error as obtained from the sample exceeds the permissible total error as determined from Table V, with correction factor applied as above, and this is also unreasonable under the provisions of Section 12613 and 12614 of the Business and Professions Code, then it is deemed that a definite shortage exists and appropriate action shall be taken according to the provisions of Section 12211, Division 5, Chapter 2, Article 2 of the Business and Professions Code.

(Example: Since, in the examples previously used, the lot size was 200 and the sample size 15 the percentage is 7 1/2% (15 : 200 x 100) and, therefore, from Table IV the correction factor is .96.
Furthermore, from the Example II, the average range is 3.00 and the corresponding value from Table III is 8.56 for a sample size of 15. Then, 8.56 multiplied by .96 equals 8.22. This is the value to be used to indicate a possible shortage, based upon Table III. This also means that any minus total error obtained from the sample must not exceed minus 8.22 for the lot to be acceptable. In Example II the Corrected Total Error is minus 12, which exceeds minus 8.22, so therefore the lot continues to be of doubtful acceptability.

(Example:
The total permissible error for Example II is 15.48, or the value of 16.13 from Table V for the range of 3.00 and sample size of 15, times .96, the correction factor from Table IV. Since the Corrected Total Error of Example II is minus 12, which is less than 15.48, it cannot be presumed a definite shortage exists.
Therefore the status of the lot in this Example has not been ascertained definitely by these procedures, and the decision to continue sampling until a definite conclusion can be reached depends upon the discretion of the weights and measures official.)

(c) All packages having a minus error greater than the unreasonable individual error as determined in Section 2933.3.10, and also unreasonable under the provisions of Sections 12613 and 12614 of the Business and Professions Code, shall be held to be in violation and appropriate action shall be taken with regard to these individual packages.

2933.3.13. PROCEDURE TO BE USED. The procedure stated herein shall be used unless the average net content of the lot is determined by 100% sampling (weighing, measuring, or counting the contents of all of the packages in the lot.). The "Sample Sizes" as specified in Table I of this procedure shall be considered as the minimum sample size for a given lot size, and at the Sealer's discretion, may be increased for a given lot size from Table I.

However, the acceptance criteria as set forth in Section 2933.3.12 are to apply in determining appropriate action. Furthermore, packages found to have individual unreasonable errors as determined by Section 2933.3.10 shall be excluded from the calculations of the lot average when using a 100% sample.

2933.3.14. RANGE VARIATION DATA. The Department shall accumulate information and data pertaining to the weight, measure or count range variations of prepackaged commodities and may establish upper and lower control limits to prevent the manipulation of the range factor by any person, firm or corporation.

PROCEDURE: COMMODITIES SOLD BY VOLUME IN "STANDARD-PACK" OR "RANDOM-PACK" PACKAGES:

2933.3.20. All of the procedures set forth in Sections 2933.3 through and including Section 2933.3.13 of this Article shall apply to this procedure.